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# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1944

No. ~~684~~

26

ALLEN POPE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI FILED FEBRUARY 10, 1944.

CERTIORARI GRANTED APRIL 3, 1944.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 684

ALLEN POPE, PETITIONER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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No. 45704

ALLEN POPE

v.

THE UNITED STATES

I. PETITION—Filed July 7, 1942

*To the Honorable the Court of Claims:*

The plaintiff, Allen Pope, respectfully represents:

I. Plaintiff is a citizen of the United States residing in the City of Washington, District of Columbia.

II. This suit is brought under and by virtue of an Act of Congress (Private Law No. 306—77th Congress) which reads as follows:

“AN ACT

“To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as de-[fol. 2] scribed and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

“Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has

received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United [fol. 3] States may be applied for by either party thereto, as is provided by law in other cases."

"Approved, February 27, 1942."

III. The case referred to in Section 3 was an action known as *Allen Pope v. The United States*, No. K-366, the findings of fact and opinion in which are reported in 76 C. Cls. 436, and the printed record therein is to be found in Court of Claims, "Printed Records," Vol. 642, the original record of evidence being thought now filed in the National Archives, Department of Justice Division, Court of Claims Section. Plaintiff asks that the said decision (K-366) of March 7, 1932, comprising the Special Findings of Fact, the copy of the contract, which by reference therein is made a part of Finding II thereof, and copy of the Opin-

ion be made a part of the record in this case as Plaintiff's Exhibit "A."

IV. Section 2 of the act above quoted provides for consideration by the Court of four (4) items of claim, namely:

- (1) "for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel."
- (2) "for the work of excavating materials which caved in over the tunnel arch";
- (3) "for filling such caved-in spaces with dry packing . . . , as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based upon the volume of grout actually used,"
- (4) "for filling such caved-in spaces with . . . grout, as directed by the contracting officer, . . . the amount of grout to be as determined by the court's [fol. 4] previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing."

As to the rates of payment at which adjudication of the foregoing claims is to be made Section 2 likewise provides:

"The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims . . . ."

The contract, Exhibit "A," pp. 31, 32 thereof (Record K-366) provides the following unit rates of payment:

Item No. 1	For excavation	\$17 per cubic yard.
Item No. 3	For concrete	\$17 per cubic yard.
Item No. 4	For dry packing	\$3 per cubic yard of space filled.
Item No. 5	For grouting	\$3 per bag of cement used in grout pumped into place.

V. The facts which gave rise to the items of claim thus authorized are stated as follows:

(1) The contract required payment for excavation and concrete to a specified line shown on the contract drawings and known as the "B" line. The contracting officer, by written order, changed such "B" line from the position shown on the contract drawings to a position three (3) inches lower than as thus shown. This order resulted in the contractor not being paid for the excavation of caved-in or excavated material between the line originally shown and that directed by the change, or for 57 cubic yards, which yardage at the contract price of \$17 per cubic yard amounts to \$969.00.

The contracting officer likewise directed the omission of certain side wall lagging shown on the plans and necessary [fol. 5] to prevent cave-ins from the side walls. Because of such omissions, there were cave-ins of 287 cubic yards from the side walls which the contractor was obliged to and did excavate and which work would have been unnecessary except for such omission of lagging. At the contract rate of \$17 per cubic yard, \$4,879.00 is due for excavation of materials caved in from side walls.

Also in order to complete the tunnel as ordered, the contractor was obliged to and did fill the caved-in spaces on the sides with concrete. For such filling in, the contract fixed a price of \$17 per cubic yard, which was not paid. Payment for 287 cubic yards of concrete at the rate of \$17 per cubic yard, or \$4,879.00 is now claimed.

These statements are in accordance with the claim under Item XII in plaintiff's original petition in K-366; the same as found and reported by the Commissioner's Finding X; and in accordance with the facts as found by the Court, Finding XI, except for obvious arithmetical errors included in the latter (57 yards at \$17.00 amounts to \$969.00 instead of \$669.00; whence the total sum is \$10,727 instead of \$10,427.)

(2) The ground over the arch proved to be loose and unstable. As a consequence when excavated, it caved in throughout the tunnel.

Such conditions were not indicated in the contract. The plans depicted hard, solid rock standing in place when tunneled into. The estimated quantities of work were likewise predicated upon existence of similarly solid formations.

The contract provided for the use of timber supports to prevent cave-ins, and further stated that "The contractor will be allowed considerable latitude in the method of tim-[fol. 6] bering \* \* \*." Other provisions obligated the contractor under bond to provide for the safety and protection of the completed work, of the plant, materials and employees, which protection was to be afforded by the adequate use of timber. Specifications, Paragraphs 4, 9, 26, 30, 44, 45, 58 and 68.

The contracting officer ordered the placement of timber in manner and extent wholly insufficient to prevent cave-ins over the arch. He required the timbers to be placed in special manner, i. e., in sets devised for support of unit lengths of tunnel excavation. The sets consisted of supporting timbers placed arch-fashion transversely of the tunnel, and short heavy planks, termed lagging, resting thereon but placed longitudinally of the tunnel. In order to place such timber supports and lagging, it was first necessary to excavate a correspondingly complete unit section of tunnel to provide the space in which to set them. During the progress of such excavation and before the timbers could be erected, the loose ground, being unsupported, caved in.

Such cave-ins over the arch might have been avoided entirely by employment of flat-top type of timbering instead of an arch type. Use of flat-top type of timbering would have permitted spiling to have been driven longitudinally as the excavation for the roof proceeded bit by bit, a procedure impossible with the arch type construction. Thus the roof would have been supported at all times, and the materials below could have been safely removed thereafter and the supporting timbers erected and braced. On the basis of cost, the contracting officer denied the contractor his request to so timber the tunnel, and required him to proceed in accordance with the officer's own plans, preferring to allow cave-ins to occur and to have them refilled [fol. 7] with dry packing and grout.

In certain places where it was considered that the initial caved-in spaces would increase little, if any, if not threatened by enlargement of the excavation for the placement of timber, the particular ground being more stable, or having the appearance of stability, the timber supports were directed to be omitted. These latter untimbered sections of the tunnel have been termed "rock sections" whereas the former have been called "timbered sections." The con-

tracting officer directed that all caved-in materials from above the "B" line of the tunnel arch, both in the "rock" and the "timbered" sections to be excavated and the spaces created by the cave-ins to be filled with drypacking and grout.

The extent of the caved-in spaces is accurately determined from the coextensive volume of spaces drypacked and grouted. The total space drypacked is indicated herein-after, sub-paragraph (3), to have been 5,561 cubic yards. Of this yardage, 57 cubic yards are claimed for hereinabove, and 723 cubic yards have been allowed for in the Court's Finding X, leaving 4,781 cubic yards as the net caved-in yardage unpaid for, and of which the Government has had the use and benefit for these many years. At \$17.00 per cubic yard, this amounts ~~to~~ \$81,277.00, now claimed.

The entire tunnel could have been timbered in such manner as to prevent all cave-ins, but at an increased cost to the Government over the cost incurred by the method ordered by the contracting officer. The method followed was much more hazardous to the workmen and many accidents occurred on such account.

These yardages, namely, 5,561 cubic yards, 57 cubic yards, and 723 cubic yards are identical with those reported in the Commissioner's Findings IV, X and IX, respectively. Like [fol. 8] wise the quantities 57 cubic yards and 723 cubic yards are identical with those found in the Court's Finding XI and X, while the amount of dry-packed space, 5,561 cubic yards, is to be determined and is here computed by the method described in the Court's opinion, employing the Court's arithmetic, and based upon the number of bags of cement determined by the Court's previous Findings III and VI as having been actually used in the grout which was pumped into the drypacking.

(3) Parts of the tunnel extended through what were known as "rock sections" and others through "timbered sections." As already stated hereinabove, cave-ins over the tunnel arch occurred in both the rock and timbered sections resulting in more extensive cavities than had been anticipated. The contract contemplated that such cavities would be filled by the placement of dry-pack and grout, the former being stones of varying sizes packed in place, the voids or spaces between which stones would, in turn, be filled by pumping grout therein, grout being a liquid mix-

ture of sand, cement and water in specified proportions. The cavities thus filled were much more extensive than had been expected and although the contractor was directed and required to fill all such spaces, he was not paid, either for the dry pack or the grout, except within limited spaces determined by the contracting officer arbitrarily and without sanction of the contract.

The contracting officer did not measure the volume of dry pack actually placed, but determined by estimate the volume within the limits which he thus arbitrarily established for pay purposes. However, the exact number of bags of cement required to be used to make the grout employed to fill the voids in the dry pack is known, 22,923 bags. The contracting officer ascertained by test that the use of one bag of cement mixed in the required proportions referred to [fol. 9] sulted in 2.62 cubic feet of grout, and that the voids or spaces between the stones of the drypacking filled by such grout were 40 per cent of the total space packed. Whence, 22,923 bags multiplied by 2.62 cubic feet, divided by 40 per centum, and again by 27 cubic feet in one cubic yard fixes the total space drypacked as 5.561 cubic yards. Of the space so dry packed, the contractor was paid for 814.1 cubic yards, leaving a balance of 4,746.9 cubic yards of dry pack that was not paid for. The contract rate for dry pack was \$3.00 per cubic yard. At this rate the contractor was not paid \$14,240.70 for dry pack actually placed as directed; and this sum is now claimed as the unpaid balance due for the placement of such dry pack.

The facts as herein recited are substantially as claimed in Item V of the original petition in K-366, as found by the Commissioners, Finding IV, and substantially as found by the Court, Findings III, IV and VI.

(4) The contract provided a rate of \$3.00 per bag for cement used in grouting the dry packed spaces. In the "timbered sections" the contractor used by direction of the contracting officer a total of 13,891 bags of cement, of which he was paid for 4,132.3 bags, leaving a balance of 9,758.7 bags for which no payment was made. In the "rock sections" the contractor similarly used 9,032 bags, for which no payment whatever was made. The plaintiff thus furnished and used a total of 18,790.7 bags of cement for which no payment was made. Under the terms of the contract he was entitled to payment for the 18,790.7 bags

so used as directed at the rate of \$3.00 per bag, or \$56,362.10, for which sum claim is now made.

These facts are in accordance with Item IV of the plaintiff's original petition in K-366; likewise in accord with [fol. 10] those found by the Commissioner, Finding III, and the same as those found by the Court itself in Findings III and VI. The grout was all pumped as directed by the contracting officer into the dry packing over the tunnel arch, which packing likewise was placed as directed by the contracting officer. The United States had the use and benefit of all the dry pack and grout so placed and has not paid therefor to the extent and in the amounts hereinabove set forth.

VI. Summarized, the claims now asserted and not previously allowed are as follows:

1. Excavation and concrete not paid for:

(a) Excavation caved-in materials unpaid for because of lowering "B" line 3 inches, 57 cubic yards at \$17.00	\$ 969.00
(b) Excavation caved-in materials side walls due to omission side wall lagging 287 cubic yards at \$17.00	4,879.00
(c) Filling side wall caved-in cavities with concrete, 287 cubic yards at \$17.00	4,879.00

2. Excavation of materials which caved in over the tunnel arch, 4,781 cubic yards at \$17.00	81,277.00
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3. Filling caved-in spaces over tunnel arch with dry packing not otherwise paid for, 4,746.9 cubic yards at \$3.00	14,240.70
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4. Filling dry packing in overhead caved-in spaces with grout not otherwise paid for, 18,790.7 bags of cement at \$3.00	56,372.10
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• Total	\$162,616.80
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[fols. 11-12] VII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plain-

tiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims \$162,616.80.

King & King, Attorneys for Plaintiff.

George R. Shields, of Counsel.

*Duly sworn to by Allen Pope. Jurat omitted in printing.*

[fol. 13]

EXHIBIT

IN THE COURT OF CLAIMS

No. K-366

ALLEN POPE

v.

THE UNITED STATES

II. Exhibit "A"

Form 19.

THESE ARTICLES OF AGREEMENT entered into this third day of December, nineteen hundred and twenty-four, between Major J. A. O'Connor, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Allen Pope, of Washington, in the District of Columbia, hereinafter designated as the contractor, of the second part, WITNESS, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all the necessary labor, machinery, tools and appliances and do the following:

SECOND HIGH TUNNEL

Item No. 1.—Excavating shafts and tunnel, about eight thousand six hundred (8,600) cubic yards, at Seventeen dollars (\$17.00) per cubic yard.

Item No. 2—Timbering shafts and tunnel, about sixty thousand (60,000) feet B. M., at ten cents (\$.10) per foot B. M.

Item No. 3—Concrete in tunnel lining and other structures, about three thousand nine hundred and fifty (3,950) cubic yards, at Seventeen dollars (\$17.00) per cubic yard.

[fol. 14] Item No. 4—Dry packing in tunnel, about five hundred (500) cubic yards, at Three dollars (\$3.00) per cubic yard.

Item No. 5—Grouting in tunnel, about two thousand five hundred (2,500) bags of cement, at Three dollars (\$3.00) per bag.

Item No. 6—Back filling, about five hundred and fifty (550) cubic yards, at One dollar (\$1.00) per cubic yard.

Item No. 7—Steel for reinforcement, about three thousand nine hundred (3,900) pounds, at ten cents (\$.10) per pound.

Item No. 8—Steel expansion plates, about four hundred and fifty (450) pounds, at twenty cents (\$.20) per pound.

Item No. 9—Steel, miscellaneous, about six hundred (600) pounds, at fifteen cents (\$.15) per pound.

Item No. 10—Special castings, about four (4) short tons, at Two hundred dollars (\$200.00) per short ton.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

Article 3. The contractor shall commence the undertaking covered by this contract as set forth in paragraph 15 of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have power, after ten days' notice in writing to the contractor, to employ such additional plant or labor.

to purchase such materials, and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any excess cost thereof, over [fol. 15] what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided in Article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

Article 4. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the prior sanction of the Chief of Engineers, to take the work out of the hands of the contractor by giving notice in writing to that effect to the contractor and his surety or sureties; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the contracting officer shall have the right to proceed forthwith to secure the delivery of the material, or the performance of the work, by contract or otherwise, in accordance with law, conforming as nearly as practicable in completing the contract to the requirements and conditions prescribed therein. Any departure from such requirements and conditions, however, shall not release the contractor or the surety or sureties of the contractor from their liability for the damages due to the contractor's default, but they shall not be responsible for any increased cost involved in such

departure. Whatever sums may be expended by the United States in completing the said contract in excess of the [fol. 16] price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the United States in excess of those payable by the United States during the period herein allowed for the completion of the contract by the contractor, shall be charged to the contractor, and the United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained, as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 5. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the work out of the hands of the contractor as provided in Article 4 of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers, may waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: *Provided, however,* That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract.

[fol. 17] The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Article 4 hereof in case the contractor shall fail, in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of the time limit.

Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. Minor reductions in quantities, or omission of items, may likewise be made under this article by agreement in writing and prior approval of the Chief of Engineers.

Article 8. The contractor shall be responsible for and pay all liabilities incurred for labor and material in the prosecution of the work.

[fol. 18] Article 9. Until final inspection and acceptance of, and payment for, all of the material and work herein

provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 10. The contractor will hold and save the United States, its representatives, and all other persons acting for it as agent, contractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of the articles of work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, and if and when required, will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Chief of Engineers.

Article 11. Payments shall be made to the contractor as prescribed in Article 1 of this agreement, and in paragraph 17 of the attached specifications.

Article 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

Article 13. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise herefrom; but, under the provisions of Section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

[fol. 19] Article 14. In the performance of this contract, the contractor shall not, directly or indirectly, employ any minors under the age of sixteen years, nor any persons undergoing sentences of imprisonment at hard labor which

have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction.

\* Article 15. In so far as the Act of August 1, 1892, or the Act of March 3, 1913, applies, no laborer or mechanic employed by the contractor or by any subcontractor on the work herein specified, and no person employed to perform services similar to those of laborers and mechanics while directly operating dredging ~~or rock~~-excavating machinery or tools on the work herein specified, shall be permitted or required to work more than eight hours in any one calendar day except in case of extraordinary emergency.

Article 16. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

Article 17. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

Article 18. The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid or [fol. 20] promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commis-

\* Cancel this Article in any contract to which the Act of August 1, 1892, or the Act of March 3, 1913, does not apply.

+ Cancel this Article in any contract to which the Act of June 19, 1912, does not apply.

sion, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid: *Provided, however*, It is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part, by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods.

‡ Article 19. This contract shall be subject to the approval of the Chief of Engineers, U. S. Army; and such approval, when given, shall relate back to, and be operative from, the date of the execution of the contract.

In Witness Whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written. Article — having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses: S. L. Duryee, as to J. A. O'Connor, Major, Corps of Engineers, U. S. Army; R. B. Cummings, as to Allen Pope; — — —, as to — — —.

[fol. 21] (Executed in Triplicate)

Approved: December 18, 1924.

Edgar Jadwin, Brig. Gen., Corps of Engineers, Acting Chief of Engineers, U. S. Army.

‡ Cancel this Article in all emergency contracts.

I certify that all of the terms of this contract are within the requirements of The Act of Congress approved June 7, 1924, and the revised estimates.

Edgar Jadwin, Brig. Gen., Corps of Engineers, Acting Chief of Engineers.

— or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

—, Corps of Engineers.

Subscribed and sworn to before me this — day of —, 192—. —, —.

I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and service, on proposals received in response to advertisement hereto attached, which was published for — days by —, and that further advertisement was impracticable.

—, Contracting Officer.

NOTE.—The copy of contract for the Bureau must be accompanied with an abstract of the bids, and one copy (original) of each bid and advertisement, unless previously furnished.—A. R. 549.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; and an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

Certificate to be given by the contracting officer on the copies of the contract for the Chief of Engineers, and the General Accounting Office, Military Division.

"Insert "newspaper" or "poster and circular letter," etc., as the case may be.

This affidavit is required only on the copy of contract intended for the Returns Office, Department of the Interior.

—A. R. 563.

Form 19. War Department. Engineers. Authorized April 30, 1896. With amendments to Nov. 17, 1923. 3760 D. C. Water Supply 9/3.

Articles of Agreement. Entered into Dec. 3, 1924, between Major J. A. O'Connor, Corps of Engineers, of the first part, and Allen Pope, of Washington, D. C., of the second part, for construction of Second High Tunnel. Office, Washington, D. C., U. S. Engineers, Dec. 19, 1924.

[fol. 23]

## War Department

### Increasing Water Supply, District of Columbia

#### Advertisement

United States Engineer Office,  
250 Old Land Office Building, Washington, D. C.

Sealed proposals will be received here until 12 M., November 4, 1924, and then opened, for the construction of the tunnel for the 2nd high service of the water supply for the District of Columbia. Further information on application.

#### General Specifications

1. *Guaranty.*—No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. *Bids In Duplicate.*—All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. *Liability of Guarantors.*—Each individual guarantor will justify in the sum equal to 20 per centum of the proposal which his guaranty accompanies. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Stat., 487, Chap. 120, and is expressed in the guaranty attached to the bid.

4. *Contract and Bond.*—The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved bond, in an amount approximately equal to and not less than 50 per centum of

the estimated amount of the contract, within 10 days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, [fol. 24] blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract. The right is reserved to reject any or all bids, and to waive any informalities in the bids received.

5. *Address.*—The proposals and guaranties must be placed in a sealed envelope marked "Proposal for Tunnel Construction, to be opened November 4, 1924," and inclosed in another sealed envelope addressed to The District Engineer, 250 Old Land Office Building, Washington, D. C., but otherwise unmarked. (Note.—It is suggested that the inner envelope be sealed with sealing wax.)

6. *Definition of Terms.*—Whenever the term "contracting officer" is used in the specification it is understood to refer to the District Engineer in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. *Quantities Approximate.*—It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. *Errors and Omissions.*—The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. *Contractor's Responsibility.*—It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for

any damage or injury done by or to them from any source or cause.

[fol. 25] 10. *Convict Labor*.—In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. *Objectionable Employees*.—The contractor will be required to discharge any employee who, in the opinion of the contracting officer, is objectionable or incompetent. This requirement shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. *Contractor To Be Present or Represented*.—The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, to be designated in writing by the contractor, who shall be clothed with full authority to act for him in all cases, and to carry out any instructions relative to the work which may be given by the contracting officer, either personally or through an authorized representative.

13. *Sundays, Holidays, and Nights*.—No work shall be done on Sundays or on days declared by Congress as holidays for per diem employees of the United States except in cases of emergency, and then only with the written consent of the contracting officer; nor shall any work be done at night unless authorized in writing by the contracting officer.

14. *Eight-Hour Laws*.—The attention of bidders is called to the Acts of Congress approved August 1, 1892, June 19, 1912, and March 3, 1913, limiting the hours of daily service of certain classes of persons defined in the acts, upon work covered by contracts with the United States. Copies of these acts may be obtained at this office. All bidders are advised that the provisions and stipulations of such of these acts as apply to the work covered by these specifications will be considered as included in any contract entered into under these specifications, and that violations of the Act of August 1, 1892, or the Act of March 3, 1913, will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take, and [fol. 26] violations of the Act of June 19, 1912, will be re-

ported by any officer or person designated as inspector of the work to be performed under these specifications, to the proper officer, as directed in the act.

15. *Commencement, Prosecution, and Completion.*—The contractor will be required to commence work under the contract within 30 days after the date of receipt of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within 24 months after said date of receipt of notification.

16. *Sufficiency of Time.*—The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforeseeable conditions arise.

If, at any time after the date fixed for beginning work, it shall be found that operations are not being carried on at the prescribed rate or at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, the contracting officer shall have the power, after 10 days' notice in writing to the contractor, to put on such additional labor or plant, or to purchase such materials as may be necessary to put the work in a proper state of advancement, and any actual final excess cost thereof to the United States over what the work would have cost at the contract rate, after crediting the contractor with the value to the United States (as determined by the contracting officer) of the remaining plant and unused materials so purchased, will be deducted from any sums due or to become due the contractor. The right is reserved to the United States to assume the capacity of the plant and force actually on the work at any time as a measure of probable progress thereafter.

The provisions of this paragraph, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided for in the contract form; nor shall any failure of the contracting officer to take action under this paragraph or to take the [fol. 27] work out of the hands of the contractor, in case the contractor fails to make a satisfactory rate of progress during any month or any series of consecutive months, be construed as a waiver of the right of the United States to require the contractor to make good the deficiency in future

months, or to take further action under this paragraph, or to later take the work out of the hands of the contractor if the deficiency is not made up within a reasonable time.

17. *Payments.*—The District of Columbia appropriation act approved June 7, 1924, contains the following provisions:

“For continuing work on the project for an increased water supply for the District of Columbia, adopted by Congress in the Army appropriation Act for the fiscal year 1922, as modified by the District of Columbia appropriation Acts for the fiscal years 1923 and 1924, and as further modified by the report submitted to Congress by the Secretary of War December 4, 1923, and for each and every purpose connected therewith, to be immediately available and to remain available until expended, \$1,500,000: *Provided*, That the Secretary of War may enter into contracts for materials and work necessary to the construction of said project, to be paid for as appropriations may from time to time be made, not to exceed in the aggregate the sum of \$8,900,000, including all appropriations and contract authorizations herein and heretofore made: *Provided further*, That no bid in excess of the estimated cost for that portion of the work or plant covered by the bid shall be accepted, nor shall any contract for any portion of the work, material, or equipment to constitute a part of the plant for which this appropriation is available be valid unless the Chief of Engineers of the United States Army shall have certified thereon and that all its terms are within the requirements of the authorization and the revised estimates for the work.”

Of these amounts the sum of \$100,000 of the funds appropriated and the balance from contract authorization will be allotted and reserved for payments for the work herein specified, including all costs of superintendence and inspection [fol. 28] and other collateral and incidental expenses connected therewith. It is expected that Congress, in accordance with the provisions of the act quoted in this paragraph, will make additional appropriations before available funds are exhausted, but as to this it must be distinctly understood and agreed that the United States is in no case to be made liable for damages in connection with this con-

tract on account of delay in payments on same due to a lack of available funds. Should it become apparent that the available funds will be exhausted before the completion of the contract, the contracting officer will give 30 days' written notice to the contractor that work may be suspended; but, if the contractor so elects, he may continue work under the conditions and restrictions of the specifications, after the time set by such notice, so long as there are funds for inspection and superintendence, with the understanding, however, that no payment will be made for such work until additional funds shall have been provided in sufficient amount. When funds again become available, the contractor will be notified accordingly. Should work be thus suspended, additional time for completion will be allowed equal to the period during which work is necessarily so suspended, as determined by the dates specified in the above notices. (See par. 15.)

So long as funds are available, payments will be made monthly on estimates of work done in accordance with the specifications and not included in any prior estimate, except that 10 per centum of the amount of each estimate will be retained until the contract work is 50 per centum completed, and thereafter with each monthly payment there will be paid such portion of the amount so retained as is in excess of 10 per centum of the estimated cost of completing the work remaining to be done, until the amount retained is reduced to \$16,000, after which the amount retained will remain unchanged until the full completion of the contract. Should payment be discontinued owing to exhaustion of available funds, all but \$16,000 of the total amount retained will be paid to the contractor.

The procedure above described will be repeated as often as may be necessary on account of the exhaustion of available funds and the necessity of awaiting the appropriation of additional funds by Congress.

Should Congress fail to provide additional funds during its regular session as expected, the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him, at any time not later than 30 days after payments are discontinued, or if payments have been previously discontinued, not later than 30 days after the passage of the act which would ordinarily carry an appropriation for continuing the work, or after the adjournment of Congress without passing such act.

18. *Bidder's Ability.*—Each bidder shall submit with his proposal a statement setting forth what experience he has had in the prosecution of construction work of a magnitude comparable to that covered by these specifications. Award will be made only to the bidder who can demonstrate beyond question that he has had the experience and ability to prosecute the work to completion within the time specified and in no case will the contract hereinafter described be awarded to a bidder unless he can show to the satisfaction of the contracting officer that he has the organization and equipment necessary to complete the contract within the time specified.

### Detailed Specifications

19. *Location.*—The work is located in the District of Columbia and extends along the line of Upton Street between 37th and 44th Streets, northwest.

20. *Work Required.*—The work required consists of furnishing all necessary materials, labor, plant, tools, machines, and appliances and constructing a tunnel about 6 feet in diameter and about 3,600 feet in length with shafts, inlet and outlet structures and concrete lining complete, as described in these specifications and shown on the drawings referred to in Paragraph 29, with such minor modifications, if any, as may be required by the contracting officer under the provisions of Paragraph 30.

The work on the tunnel is divided into 10 items and the approximate quantities in the various items are as follows:

Item No. 1—Excavating shafts and tunnel	8,600 cubic yards
“ “ 2—Timbering shafts and tunnel	60,000 feet B. M.
“ “ 3—Concrete in tunnel lining and other structures	3,950 cubic yards
“ “ 4—Dry packing in tunnel	500 “
“ “ 5—Cement in grout	2,500 bags
“ “ 6—Back filling	550 cubic yards
“ “ 7—Steel for reinforcement	3,900 pounds
“ “ 8—Steel expansion plates	450 “
“ “ 9—Steel, miscellaneous	600 “
“ “ 10—Special castings	4 short tons

21. *Order of Work.*—The work may be carried on in such order as the contractor may deem most advantageous, provided that it is approved by the contracting officer.

22. *Geological Formation.*—Borings have been taken on the site of the work, and the geological formation, as indicated by these borings, is shown on Sheet No. 1 of the drawings described in Paragraph 29.

Bidders will have access to all data that has been collected by the contracting officer regarding the geological formation on the site of the work. They are expected to determine for themselves the nature of the formation, to check the data collected by the contracting officer and to assure themselves regarding the formation through which their work will be carried, and any discrepancies between the nature of the formation as it actually exists and as indicated by the data given by the contracting officer will not be recognized as valid grounds for any claim against the United States for compensation over and above the prices named in their bids.

23. *Transportation Facilities.*—Materials for constructing the tunnel may be hauled to the site of the work on either Massachusetts and Nebraska Avenues or Wisconsin Avenue and Pierce Mill Road.

24. *Land To Be Occupied.*—The United States owns the subterranean right of way only for the construction and [fol. 34] maintenance of the tunnel. It owns no surface rights with the exception of a narrow strip for pipe lines. The contractor will, therefore, be required to provide, at his own expense, such land as he may require for his plant, equipment and for the final disposal of materials excavated from the tunnel.

25. *Plant and Organization Required.*—The purpose of this contract is to effect the construction of the works described in these specifications in the shortest reasonable time consistent with good construction. To this end the contractor will be required to use improved methods and appliances for doing the various parts of the work. A complete and suitable construction plant must be used and an effective organization must be maintained. The contractor shall submit to the contracting officer plans showing his proposed layout of plant and transportation facilities and a

complete schedule of equipment, including the apparatus for measuring fine and coarse aggregates and water for concrete. No plant shall be installed by the contractor and no work done on the contract prior to the approval by the contracting officer of the contractor's layout plans and equipment schedule.

26. *Responsibility of Contractor for Plant and Methods.*

—The contractor shall provide and install such construction plant and shall use such methods, appliances and organization for the performance of all operations connected with the work to be done under the contract as will insure a satisfactory quality of work and a rate of progress which, in the opinion of the contracting officer, will insure the completion of the work within the time specified. If at any time before the commencement or during the progress of the work such methods or appliances appear to the contracting officer to be unsafe, inefficient or inadequate for securing the safety of the workmen, the quality of the work or the rate of progress required, he may order the contractor to increase their safety and capacity or to improve their character, and the contractor shall comply with these orders. Failure of the contracting officer to make such demand shall not release the contractor from his obligation to secure the safe conduct, the quality of the work, and the rate of progress required by the contract.

[Eol. 32] The contractor shall at all times be responsible for conducting his work in such a manner as to insure the safety of all structures. If at any time any Federal structures, whether previously constructed or being constructed under this contract, or constructed otherwise, are injured or rendered unsafe for use by the operations of the contractor, he shall at his own expense immediately and thoroughly repair all damages to the satisfaction of the contracting officer.

The contracting officer reserves the right to limit the use of explosives, or to order the discontinuance of the use of any method of operation which, in his opinion, endangers any part of the existing structures, and no claim for additional compensation by the contractor, on account of such orders, will be considered.

The contractor shall also be responsible for any damage to existing structures or property outside the property lines of the United States that may be caused by his operations.

27. *Repairs To Plant.*—The contractor shall at all times maintain on the site of the work a suitable repair shop and equipment for the purpose of making adjustments and repairs to machinery and for the general maintenance work required in keeping the construction plant up to its normal efficiency, and shall have on hand, at all times, duplicate parts of such machinery as are especially liable to wear rapidly, break or be lost.

28. *Field Office.*—The contractor shall, during the continuance of his contract, provide and maintain on the site of the work a suitable office for his own use furnished with office equipment and telephone, and shall keep a full set of drawings and specifications in said office for reference.

29. *Drawings.*—The work shall conform to drawings entitled "Increase of Water Supply for the District of Columbia, Second High Tunnel," which form a part of these specifications and are filed in the United State Engineer-Office, Old Land Office Building, Washington, D. C. They consist of 2 sheets, namely, Sheet No. 1, entitled "General Plan and Profile," and Sheet No. 2, "Typical Sections & End Structures," and bear the signature of the contracting officer dated August 11, 1924. These plans show the general character of the work and are intended to supplement the specifications in such a manner as to make them explanatory to each other, but should any discrepancy appear, or any misunderstanding arise as to the import of anything contained in either, the explanation of the contracting officer shall be final and binding on the contractor.

Such detail drawings as the contracting officer may consider necessary to amplify and explain the contract drawings will be furnished by him. Figures shown on drawings shall in all cases take precedence over scale measurements.

All drawings and specifications are the property of the contracting officer. Prospective bidders will be furnished copies of drawings upon the deposit with the contracting officer of cash or certified check to the amount of \$3.00, which will be forfeited in case of failure to return all drawings on or before January 30, 1925. The contractor will be furnished, free of cost, 6 complete sets of the contract drawings and 4 copies of any supplementary drawings that may be issued.

Should it become necessary that the contractor submit drawings for the approval of the contracting officer in con-

nection with the work to be done under these specifications, they shall be furnished to the contracting officer in tracing form and free of charge.

Any corrections of errors or omissions in the drawings and specifications may be made by the contracting officer when such correction is necessary for the proper fulfillment of their intention as construed by him, and his decision in such cases shall be final and binding. The contractor shall check all dimensions and quantities on the drawings or schedules given him by the contracting officer, and he will not be allowed to take advantage of any error or omission in the specifications or drawings, but shall accept the decision of the contracting officer as to the intent of the drawings and specifications.

30. *Minor Modifications.*—The contracting officer reserves the right to make any additions to, omissions from or alterations in the work as described in these specifications [fol. 34] and shown on the drawings referred to in Paragraph 29, whenever he shall deem such additions, omissions or alterations necessary or desirable, provided that the sum total of all such additions to or subtractions from the contract plans amounts to less than 10 per centum of the total amount of the contract price.

All changes will be ordered by the contracting officer in writing, and the value of any additions, omissions or alterations so ordered will be added to or deducted from the contract price. Such value will be determined and fixed by the contracting officer on the basis of the unit price bid under the contract. The contractor shall have no claim for damages or for anticipated profit on account of any additions, omissions or alterations ordered as above provided, and such additions, omissions and alterations shall in no way vitiate this contract.

31. *Extra Work.*—Extra work under this heading shall be understood to mean all work other than that which is itemized in these specifications. The contractor shall do such extra work as may be ordered in writing by the contracting officer, and no claim for extra work will be considered or allowed unless the said work has been approved and ordered in writing by the contracting officer.

At the option of the contracting officer, the price of such extra work may be agreed upon in advance of the execution of the same, or it may be done on the basis of actual cost to

the contractor plus a commission of fifteen per centum to cover supervision and use of tools.

The actual cost of extra work above specified shall include only the cost to the contractor of necessary labor and materials employed on or incorporated into the work, together with the cost of insurance of employees and the public, where such insurance is carried, and such allowance for the use of any machinery actively employed on the work as may be determined by the contracting officer, but such actual cost shall not include the use of tools, general superintendence, office accounting, engineering expenses, allowances or percentages for collateral or estimated costs, or any profit, all of which shall be deemed to be and shall be [fol. 35] included in and covered by the above specified allowance of 15 per centum.

All such extra work shall be done as economically as possible, and materials and supplies used in such work shall be charged at the lowest market price prevailing at the nearest general supply point at the time of the work. The contracting officer may at his own discretion furnish any materials or supplies required for extra work, and the contractor shall not be entitled to any allowance or percentage on account of materials and supplies so furnished.

At the close of each day on which extra work performed on the actual cost basis shall have been done by the contractor, reports shall be made out in triplicate on forms to be furnished for that purpose by the contracting officer, showing in detail the cost and character of extra work performed on that day; these reports shall be approved by the contracting officer and by the contractor or his proper agent, and one copy shall be retained by the contractor. No work will be paid for as extra work upon which a unit price has been bid under this contract.

32. *Lines and Grades.*—All lines and grades will be given by the contracting officer or his representatives, but the contractor shall provide such material and give such assistance as may be required, and shall carefully preserve the marks. The contractor shall keep the contracting officer informed a reasonable time in advance as to times and places in which he intends to do work in order that lines and grades may be furnished and necessary measurements for record and payments may be made with a minimum inconvenience to the contracting officer and the contractor.

33. *Reference Lines for Tunnel and End Structures.*—The reference lines designated as "A," "B" and "C" lines on the drawings showing the cross sections of the tunnel have the following significance: The "A" line is that within which no unexcavated material of any kind and no timbering will be permitted to remain. It is, therefore, the outer line of minimum thickness of masonry lining in any portion of the tunnel.

[fol. 36] The "B" line defines the outer limits of excavation and lining to be paid for regardless of the amount of material removed outside of that line.

The "C" line is the outer line of effective average thickness of masonry lining. No rock or other foreign materials will be permitted to remain within the "C" line except under such circumstances that the strength of the lining against external pressure, considered in lengths not exceeding 4 feet, is not thereby reduced. Payment lines for the end structures will be vertical lines 2 feet outside of the limits of the base of the masonry.

34. *Supervision.*—The work will be carried on under the general direction and supervision of the contracting officer who will employ inspectors for the work. The inspectors will keep a record of the work done and see that all necessary stakes for marking lines and grades are maintained in their proper position. They shall have power to enforce strict compliance with the terms of the specifications and to reject any work or material that does not conform to the requirements of the specifications.

The contractor shall furnish, without charge, all necessary assistance, appliances, samples of materials and test specimens including concrete for test cylinders as may be ordered by the contracting officer or by his representatives for the purpose of making official tests and investigations. He shall furnish the contracting officer with every reasonable facility for ascertaining whether the work is in accordance with the requirements and intention of the contract, even to the extent of uncovering or taking down a portion of finished work. Should the work thus exposed, or examined prove satisfactory, the uncovering or removal and replacing will be paid for at the contract price for the work done. Should the work examined or exposed prove unsatisfactory, the uncovering, removal and replacing shall be done at the expense of the contractor.

The contractor shall notify the contracting officer of the time and place of preparation, manufacture or construction of all material for or part of the work which he may wish to [fol. 37] inspect before delivery at the site of the work. Such notification shall be given sufficient time in advance of the beginning of the work on such material or part to allow arrangements to be made for inspecting and testing.

35. *Access to the Work.*—The contractor shall permit the contracting officer and his representatives to enter upon the work and the premises used by the contractor at any time, and shall provide proper and safe facilities by means of ladders or otherwise for convenient access to all parts of the work the said officer or his representatives may wish to inspect.

36. *Materials To Be Satisfactory.*—All materials furnished for carrying out the contract shall be of the best quality and of the character required by the specifications. Where no standard is specified for such materials they shall be the best of their respective kind. The contractor shall, at his expense, immediately remove any unsatisfactory materials whenever discovered and shall replace them to the satisfaction of the contracting officer whenever notified by the latter to do so.

If the contractor shall neglect or refuse to remove such unsatisfactory material within 48 hours after the service of the above mentioned notice, or if he shall not make satisfactory progress in doing so, then the contracting officer may remove said material or cause the same to be removed and satisfactorily replaced by contract or otherwise as he may consider expedient. The expense thereof will be charged to the contractor, and such expense so charged will be deducted from the amount due or to become due him under the contract.

37. *Defective Work.*—Neither the inspection nor supervision of the work, nor the presence of any employees of the contracting officer during the execution of any work shall relieve the contractor of any of his obligations to fulfill his contract or to perform his work to the lines, grades, etc., given by the contracting officer or his representatives. Defective work shall be made good notwithstanding that such work may have been previously overlooked by the contracting officer or his representatives and accepted and paid for.

[fol. 38] If the work or any part thereof shall be found defective at any time before the final acceptance of the whole work, the contractor shall forthwith make good such defect in a manner satisfactory to the contracting officer.

38. *Contracting Officer To Be Referee.*—To prevent disputes and litigation, the contracting officer shall in all cases determine the amount, quality and acceptability of the work and supplies which are to be paid for under the contract; shall determine all questions in relation to the work and supplies; and shall in all cases decide every question relative to the fulfillment of the terms and provisions of the contract. His decision and estimates shall be final. He shall also make all necessary explanations as to the meaning and intention of the specifications, and shall give all orders and directions necessary to cover cases in which difficult or unforeseen conditions may arise during the performance of the work.

39. *Claims for Damages.*—If the contractor shall claim compensation for any damage sustained by reason of the act of the contracting officer or his representatives, he shall, within 5 days after the alleged sustaining of such damage, make a written statement thereof to the contracting officer. On or before the 15th day of the month subsequent to that in which any such alleged damage shall have been sustained, the contractor shall file with the contracting officer an itemized statement of the details and amount of such damage, and unless such statement shall be made his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such alleged damage.

40. *Indemnifications of the United States.*—The contractor will hold and save the United States harmless from all suits, actions, damages or costs of every name and description to which the United States may be subjected or put by reason of injury to persons or damage to property resulting from negligence or carelessness on the part of the contractor, his employees or agents in the delivery of materials and supplies, or on account of any act or omission of the contractor, his employees or agents in the execution of the work, and the whole or so much of the moneys due or to become due the contractor under the contract, as may be considered necessary by the contracting officer, may be

[fol. 39]

retained by him until such suits or claims for damages have been settled or otherwise disposed of and satisfactory evidence to that effect furnished to the contracting officer.

41. *Patent Rights.*—The contractor will hold and save the United States, its representatives, and all other persons acting for it as agent, contractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of the articles of work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, and if and when required, will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Chief of Engineers.

42. *Sanitation.*—The sanitary precautions, including the care of employees, shall at all times be satisfactory to the contracting officer and to the District of Columbia Health Departments. The contractor shall fully and promptly comply with all orders and regulations emanating from these sources.

The necessary sanitary conveniences for use of all laborers on the work, properly obscured from public observation, shall be constructed and maintained by the contractor in such manner and at such points as shall be approved by the contracting officer and their use shall be strictly enforced. The collection in the same shall be removed and disposed of to the satisfaction of the contracting officer.

The contractor shall obey and enforce such other sanitary regulations and orders and shall take such precautions against infectious diseases as the contracting officer may deem necessary. In case any infectious disease occurs among the employees he shall arrange for the immediate removal of the patient from the work and for his isolation from all parties connected with the work. The contractor shall keep and maintain in good condition at convenient points all articles necessary for giving first aid to the injured.

[fol. 40] Garbage, both liquid and solid, shall be promptly and satisfactorily placed in approved covered receptacles

of sufficient capacity for about one day's ordinary production, and at least once in every 24 hours all such garbage shall be incinerated or otherwise quickly disposed of to the satisfaction of the contracting officer.

All tin cans, bottles and materials of similar nature shall be periodically removed from the work and in no case thrown about or disposed of on the grounds.

43. *Emergencies.*—It is possible that emergencies may arise during the progress of the work which may require special treatment or make advisable extra shifts of men to continue the work for 16 or even 24 hours per day. These emergencies may be caused by damage to the nearby existing structures or by accidents or leakage. The contractor shall be prepared in case such emergencies arise to make all necessary repairs and shall promptly execute such work when required by the contracting officer.

44. *Care and Protection of Work.*—The contractor shall place sufficient lights on or near the work, and shall erect such rails, fences or other protections as may be necessary for the public safety.

The contractor shall be solely responsible for the care of the work covered by the contract and for the material delivered at the site intended to be used in the work. He shall provide suitable means of protection for all material intended to be used in the work, and for all work in progress as well as for completed work.

45. *Removal of Water.*—The contractor shall provide all necessary pumps, pipes, drains, ditches and other means for satisfactorily removing water from excavations or other parts of the work, or for preventing the slopes of excavations from sliding or caving. He shall provide additional pumps or drains in any place where the contracting officer shall deem them to be necessary.

No direct payment will be made for the above work which is considered as having been included in the price stipulated for excavations.

[fol. 41] 46. *Contractor To Repair Damages.*—In case any direct or indirect damage or injury is done to any public property including any completed or partly completed structures erected or being erected under this contract by or because of the work or in consequence of any act or

omission on the part of the contractor or his employees, he shall, at his own expense, restore such property to a condition equal to that existing before such damage or injury was done by repairing, rebuilding or otherwise, as may be required by the contracting officer. In case of failure on the part of the contractor to promptly restore such property or make good such damage or injury the contracting officer may upon 48 hours written notice, proceed to repair, rebuild or otherwise restore such property as may be necessary, and the cost thereof will be deducted from the amount due or to become due the contractor.

47. *Restoration of Site.*—The work under these specifications shall not be considered complete until after final inspection has been made and the contractor shall have removed all of his plant from the site and from the property of the United States; restored the hauling roads other than the present roads to the original condition of the ground; cleared from the site all debris resulting from his operations, and placed the property in a clean and sightly condition and satisfactory to the contracting officer.

48. *Measurements.*—The quantities to be paid for will be determined by measurements made on the ground by the representatives of the contracting officer, of the finished work according to the lines shown on the drawing or called for by the specifications and by computations therefrom, and the actual quantities so determined will be used as a basis for payment.

49. *Prices.*—The prices stated in the proposal will be paid and shall be accepted as full compensation for furnishing all materials and for doing all the work contemplated and specified in the contract, as well as for all loss or damage arising from the action of the elements or from unforeseen conditions or difficulties which may arise in the prosecution of the work.

[fol. 42] The above mentioned prices shall cover the cost and furnishing by the contractor of all plant, tools, labor and materials of every kind which are furnished or needed to complete the entire work, for making all needed repairs to the work and for maintaining it in a satisfactory condition until the final payment is made. Such prices shall also cover all royalties for patents and patented materials, appliances and processes used in the work.

## Materials

50. *Cement*.—All cement used on the work shall be true Portland cement of well known brands which have been in successful use for large engineering works in America for at least 5 years. It shall conform to the requirements stated in the United States Bureau of Standards Circular No. 33, effective January 1, 1921. It shall be delivered on the site of the work in the original undamaged packages with the brand and name of the manufacturer plainly marked thereon.

If the cement is delivered in bags, each bag shall contain 94 pounds net, and if in barrels, each barrel shall contain 376 pounds net. The cement shall be stored in suitable buildings which are protected from dampness and in such a manner as to permit of easy access for the proper inspection and identification of each shipment.

The cement used in the work shall either be taken from sealed bins which have passed the 28-day test by the Bureau of Standards and shipped in cars sealed by the Bureau of Standards, or 28-day tests will be made on the work by the Bureau of Standards and reports on the tests furnished to the contracting officer.

In the former case only sufficient storage at the work will be required to guarantee continuous operations. In the latter case the amount of storage must be increased sufficiently to provide for the 28-day test on the work. The contractor shall also provide and keep on hand in each storehouse suitable accurate platform scales for weighing the cement.

Immediately upon the arrival of each new shipment of cement, the contractor shall notify the contracting officer the [fol. 43] amount of cement received. No cement shall be used on the work until after it has been inspected and permission has been given by the contracting officer for its use.

51. *Fine Aggregate*.—All sand used for concrete in all parts of the work shall be siliceous sand of the best quality, clean, hard, strong, durable and uniformly graded from fine to coarse. The sand shall be free from lumps of clay, oily and greasy materials, vegetable loam and organic matter, and shall not contain over 5 per centum of clay or other foreign material and practically no particles greater than one quarter inch in diameter; not more than 30 per centum

by weight shall pass a sieve having 50 meshes per linear inch.

52. *Coarse Aggregate.*—Coarse aggregate for concrete shall consist of either gravel or crushed stone having clean, hard, strong, durable, uncoated particles free from soft, friable, thin, elongated or laminated pieces, alkali, organic, or other deleterious matter.

The coarse aggregate shall be well graded and range in size from fine to coarse within the limits of between  $1\frac{1}{2}$  inches and one-quarter inch in diameter.

53. *Water.*—The water for concrete shall be clean and free from oil, acid, alkali, organic matter and other deleterious substances and shall be furnished by and at the expense of the contractor.

54. *Steel for Reinforcement.*—The steel used for reinforcement in concrete shall be of a quality and character meeting the requirements either of the "Standard Specifications for Billet-Steel Concrete Reinforcement Bars" (Serial Designation: A 15-14) or the "Standard Specifications for Rail-Steel Concrete Reinforcement Bars" (Serial Designation: A 16-14) of the American Society for Testing Materials, except that the provision for machining deformed bars before testing shall be eliminated.

The bars shall be either square twisted or deformed, of approved types. Their areas, when determined by the [fol. 44] minimum cross-section, shall conform to the areas and equivalent sizes given in the following table:

Size of Bar in Inches	Area in Square Inches	
	Round	Square
$\frac{3}{8}$	0.110	0.141
$\frac{1}{2}$	0.196	0.250
$\frac{5}{8}$	0.307	0.391
$\frac{3}{4}$	0.442	0.563
$\frac{7}{8}$	0.601	0.766
1	0.785	1.000
$1\frac{1}{8}$	0.994	1.266
$1\frac{1}{4}$	1.227	1.563

The bars shall be free from scales, grease, paint or other objectionable coatings when placed in the work. A thin coat of red rust resulting from short exposure will not be considered objectionable, but any bars having rust scale or a

thick coat of rust shall be carefully cleaned before they are used.

The steel used for the expansion plates shall be made in accordance with the latest Standard Specifications of the American Society for Testing Materials for boiler flange steel.

55. *Timber and Lumber.*—All timber and lumber used for forms timbering tunnel and temporary work shall be of good quality and of a kind and size which is suitable for the class of work in which it is used.

56. *Miscellaneous Materials.*—All miscellaneous materials which may be required in comparatively small quantities and which are not specified herein shall be the best of their respective kind and shall be entirely suitable and satisfactory to the contracting officer in all respects.

57. *Inspection of Material.*—All materials used by the contractor on the work shall be readily accessible for inspection at all times. The contractor shall, when required, make arrangements whereby certificate of inspection of steel and other materials shall be obtained by him and delivered to the contracting officer as soon as practicable and [fol. 45] before shipment of such materials has been made. The contracting officer will, however, make such inspections and tests of all materials as he may deem necessary and no materials shall be used in the work until after they have been accepted.

#### Items Nos. 1 and 2

58. *Excavation in Tunnel and End Structures.*—The excavation under this section includes all the work of this class necessary in the tunnel and for the end structures as shown on the drawings. The excavation in the tunnel shall be made within the prescribed limits as shown on the drawing and as described in these specifications. The contractor shall make all excavation in the tunnel in accordance with reference lines "A," "B" and "C" as shown on the drawing and described in paragraph number 33, but with the understanding that no excavation removed beyond the "B" line will be paid for. Where necessary to protect existing structures in the removal of rock or other material, the contractor shall take proper precautions to avoid damage thereto. Where it is necessary to support the excavation in the tunnel and when required

by the contracting officer, the contractor shall do all timbering necessary to protect the excavation until after the concrete masonry lining has been placed, but so far as practicable the timbering and lagging in the tunnel shall be removed before the placing of the concrete lining. All timber placed in the tunnel shall be of good sound quality and of a kind and size suitable for the work. Timbering shall be done in a workmanlike manner and so as to best fulfill the requirements of the particular work in which it is used. The contractor will be allowed considerable latitude in the method of timbering, but it must be of ample strength to be entirely safe and also such as to meet the approval of the contracting officer. The contractor will not be relieved, however, of entire responsibility for any damage or accident caused by failure of the timbering in any case.

The price bid for excavation in the tunnel shall cover the cost of all necessary blasting, barring and mucking of material encountered, bailing, draining and pumping of water which may leak into excavation, and the disposition of all excavated material as may be directed. Material removed [fol. 46] and suitable for use as crushed stone or packing may be so used by the contractor. The actual amount of material excavated within the "B" line will be paid for by the cubic yard at the price bid by the contractor, which shall include the entire cost for excavating and all other items mentioned above.

The material and labor for timbering in the tunnel will be furnished by the contractor and paid for as such in place for the amount actually used in feet board measure, at the price bid by the contractor.

Such timbering as may be removed from the tunnel will be considered the property of the contractor and may be again used and paid for in case it is entirely suitable for such use. All spikes, bolts and other fastenings and all materials and labor incidental to the work of timbering in the tunnel and its removal therefrom will be included in the price paid for such work as stated above.

The timber or lumber used for setting up the plant, construction of forms, loading platforms or temporary buildings or structures will not be construed as a part of the item for timbering tunnel and will be furnished at the expense of the contractor.

## Item No. 3

59. *Concrete Masonry.*—All concrete masonry used in the tunnel lining and the various other structures shall consist of Portland cement, sand and gravel or crushed stone, mixed in the proportions of one part by volume of Portland cement, 2 parts of sand and 4 parts of either gravel or crushed stone. The measurement of the fine and coarse aggregates shall be by loose volume. The unit of measurement of the cement if furnished in bags, shall be a bag of cement containing 94 pounds net which shall be considered the equivalent of one cubic foot.

Separate storage shall be provided for each kind of aggregate. Measurement of each of the ingredients, including water, shall be made separately in an approved, accurate and uniform manner.

[fol. 47] The concrete batch or charge shall be of such size that it will not be necessary to use fractions of bags of cement to obtain the required mix.

The mixing shall be done in approved batch machine mixers of the type which will insure the uniform distribution of the materials throughout the mass and the mixing shall continue for a minimum time of  $1\frac{1}{4}$  minutes after all the ingredients are assembled in the mixture or until the concrete is mixed to the entire satisfaction of the contracting officer. The amount of water used in mixing concrete shall be only sufficient to produce the consistency required for manipulation and in no case will free water be permitted in the forms. Concrete shall not be remixed with water after it is partly set and it shall not be used after the initial set has taken place. Immediately after mixing the concrete shall be rapidly transported and placed in the work, care being taken not to allow stratification in the mixture. No concrete shall be placed in freezing weather without the approval of the contracting officer.

The concrete shall be thoroughly tamped, spaded and worked into the forms, forming a solid homogeneous masonry. Special care shall be taken to ram the concrete into all the spaces between the uneven interstices of the rock and all spaces between the forms. The invert of the tunnel lining shall be placed in alternate sections about 15 feet in length and be tamped, screeded and trowelled accurately to the required lines and grades shown on the drawings. The walls and arches of the above shall be built

in monolithic sections of such length as can easily be placed in one working day. Each of the above monolithic sections shall be built with vertical ends by means of vertical bulkheads placed in the forms.

Suitable approved keyways shall be provided in joints and special care shall be taken to remove all laitance from the surface before placing fresh concrete on older concrete. Laitance should preferably be removed while concrete is in plastic condition. From the older surface it shall be removed by picking and chipping. After cleaning all concrete surfaces and immediately before placing any concrete the entire surface to be covered shall be slushed [fol. 48] with a plastic layer of cement mortar one-half inch thick, composed of one part of cement and 2 parts of sand.

The space inside the forms shall be thoroughly cleaned of shavings, sawdust or other material immediately before placing the concrete. Any blocks of wood or other materials used as spacers shall be removed from the forms as soon as the concrete reaches the level of the spacers.

60. *Forms for Concrete Masonry.*—The contractor shall provide all necessary molds, forms and centers for supporting and shaping the concrete. All forms shall be water tight, true to line and so put together as to present a satisfactory smooth surface with no indentation or warping. They shall be so strongly built and put together and braced as to withstand all the operations incidental to the placing of concrete without being deformed or displaced, and they shall stand without movement until the concrete is set. To obtain tightness, calking with oakum or other suitable material may be required, and the contractor shall provide the necessary materials for and do all necessary calking before placing the concrete.

The forms shall be thoroughly coated with oil or some other approved substance to prevent the concrete adhering to them. No oil or other substance shall be used that will discolor the exposed faces of the concrete. If the contractor elects to use steel forms the surface of all such forms against which the concrete is placed shall have all rivet heads counter sunk and finished smooth and flush with the surface. Otherwise such forms shall conform to the general requirements specified herein for forms. The forms shall be maintained at all times in good condition as to accuracy

and shape, strength, rigidity, water-tightness and smoothness of surface and shall be oiled as frequently as may be required to secure a proper surface on the concrete. Forms unsatisfactory in any respect shall not be used, and if condemned shall be removed immediately from the work or destroyed.

The contractor shall furnish a sufficient number of forms to insure the proper construction of the various structures and to maintain the proper rate of progress. No forms shall be removed without the permission of the contracting [fol. 49] officer or his representative. When the forms are removed no patching shall be done on the concrete surfaces until after they have been inspected. Where wires are used to hold the forms together, they shall, upon the removal of the forms, be cut off beneath the surface of the concrete, the ends carefully driven in with a punch and the holes pointed with one to two mortar before the concrete has fully set.

61. *Placing Concrete.*—Immediately before placing concrete the forms shall be thoroughly wetted. The concrete should be placed as near the point of final deposit as possible and shall be compacted in the forms and around the steel reinforcement in the most thorough manner possible by tamping and working the steel shovel or slicing tool up and down until the ingredients have settled to their proper places. Special care shall be taken to work the stone back from the forms in order to make the exposed surface of the finished work smooth and free from voids.

At the time of placing particular care should be taken to prevent any leakage of water from the concrete, and the contractor shall keep on the work ready for instant use a sufficient quantity of plastic clay, oakum or other material suitable for the purpose and shall promptly stop all leakage from the forms, or leakage that may occur between the forms and concrete previously placed.

The exposed surfaces of the tunnel inverts and other structures shall be tamped, screeded and trowelled to smooth surfaces and true to lines and grades.

Defective concrete shall be entirely cut out and removed to the extent directed, and replaced with new concrete as soon as practicable. Every precaution shall be taken to prevent the concrete from drying until there is no danger

of cracking from lack of moisture. The concrete shall be kept moist for at least one week.

The quantity of concrete masonry to be paid for shall be the number of cubic yards actually deposited within the lines and grades given in accordance with the drawings, specifications or requirements, deductions being made for all openings.

[fol. 50] The price paid per cubic yard for concrete under the various items shall include the furnishing and placing of concrete, forms, tie-rods, wires and spacers, the calking and making water tight of all joints in the forms, the troweling and finishing of all required surfaces, pumping, and all other items necessary to complete the work.

#### Items Nos. 4 and 5

62. *Dry Packing and Grouting in Tunnel.*—No dry packing will be allowed except where necessary over the crown of the tunnel arch, in which case clean sound stones shall be used for packing and the spaces between such packing shall be thoroughly filled with grout, pumped into place, consisting of one part of Portland cement and 2 parts of fine building sand mixed with a suitable amount of water.

Dry packing will be paid for by the cubic yard at the price bid by the contractor, the actual amount being determined by measuring the spaces so filled.

Grouting will be paid for by the number of bags of cement used in the grout, pumped into place and at the price bid by the contractor.

#### Item No. 6

63. *Back Filling.*—After the masonry structures for the headings and inlet and outlet of the tunnel have been completed, or when required by the contracting officer, the spaces around these structures shall be filled to the lines and grades shown on the drawings or required by the contracting officer. Before placing any back filling, all rubbish and unsuitable materials shall be removed from the space and disposed of as the contracting officer may direct. The material used for back filling shall be suitable earth containing sufficient clay to insure water tightness. The materials shall be compacted by puddling, tamping or some other satisfactory method.

The back filling will be paid for by the cubic yard at the unit price bid by the contractor for the actual amount placed

which will be determined by measurements taken of the space to be filled.

[fol. 51]

#### Item No. 7

64. *Steel Reinforcement.*—The contractor shall furnish and place all steel bars and bonding wire of whatever size, shape and length required for the reinforcement of the concrete.

All steel reinforcement shall be placed accurately in the positions shown on the drawings or as directed by the contracting officer, and shall be so fastened in position as to prevent displacement while the concrete is being deposited. The bars shall be wired together at intersections. The wire used shall be annealed of not less than No. 18, Brown and Sharpe gauge or equal thereto. All bars shall be thoroughly cleaned of all dirt or grease.

If it becomes necessary to allow any steel that has been partially embedded in the concrete to remain exposed for any length of time, the rods shall be protected against bending or injury during the time of construction, and should they become rusted they shall be thoroughly and satisfactorily cleaned before placing of new concrete.

The weight of steel reinforcement to be paid for shall be that actually placed within the forms in accordance with plans or instructions, and it shall be computed in pounds per foot for the length and cross-sections specified or ordered. The weights of tie wires and other supports will not be included. No allowance will be made for waste, but necessary laps shown on the plans or authorized by the contracting officer will be paid for.

Payments will be made for steel reinforcement at the price bid per pound under Item No. 7. The work shall include the furnishing and placing of the rods, the bending, lapping, cleaning, wiring, supporting in position, and all labor, tools, materials and appurtenances necessary to complete the work.

#### Item No. 8

65. *Steel Expansion Plates.*—Under Item No. 8, the contractor shall furnish and place all expansion plates required [fol. 52] in the execution of this contract. They shall be placed at points indicated on the drawing or as directed by the contracting officer.

The expansion plates shall be one-quarter inch in thickness and 12 inches wide; they shall be of the length and bent to the shapes indicated. Where steel plates abut one another or it becomes necessary to make a splice, they shall be welded or riveted and the joints made water-tight. Should any riveting be done there shall be at least 6 one-half inch rivets in each joint and the plates shall lap at least 4 inches. The rivets shall be countersunk and made smooth and flush with the plate on both sides.

All expansion plates shall be painted with one coat of red lead and oil paint immediately after delivery to protect them from rust.

Expansion plates shall be rigidly supported, braced and held in position, and maintained free from injury until they are finally embedded in the concrete.

The quantity of expansion plates to be paid for shall be the number of pounds actually placed in the work in accordance with the drawings or requirements.

Payment for expansion plates will be made at the unit price per pound bid under Item No. 8, which shall include all labor, tools, materials and appurtenances necessary to complete the work.

#### Item No. 9

66. *Miscellaneous Steel Work.*—Under Item No. 9, the contractor shall furnish and place all ladders and miscellaneous steel work, other than the reinforcing bars and expansion plates, that may be shown on the drawings, or required by the contracting officer, as necessary for the satisfactory completion of the work.

All exposed metal work shall be carefully cleaned and shall then be given one coat of red lead or other approved paint.

[fol. 53] The quantity of steel work paid for shall be the number of pounds actually placed in the work in accordance with the drawings and requirements.

Payment for miscellaneous steel work will be made at the unit price bid under Item No. 9.

#### Item No. 10

67. *Special Castings.*—All special castings shown on the drawings or required by the contracting officer shall be furnished and set in place by the contractor.

The special castings shall be made in conformance with the "Standard Specifications for Cast Iron Water Pipe and Special Castings" of the American Water Works Association adopted May 12, 1908, and amendments thereto if any, and with the drawings.

All castings to be placed in concrete shall be set to the exact lines and levels established by the contracting officer, and shall be securely fastened in the forms in such a way as to prevent movement during the placing of concrete, or to prevent the leakage of water from the concrete. All castings shall be clean when set, and shall be kept so during the progress of the work. The manhole castings shall be set accurately to the lines and grades shown on the drawings or required by the contracting officer and their bases shall be embedded in a layer of neat Portland cement mortar spread on the upper surface of the concrete immediately before the manhole castings are put in place.

The weight to be paid for under Item No. 10 shall be the number of short tons (2,000 pounds) as marked on the castings or given by the manufacturer.

Payment will be made for work under the above items at the unit prices bid by the contractor.

68. *Proposal and Contract.*—The proposal form has an entry for each item on which estimates will be given or payments made, and no other allowances of any kind will be [fol. 54] made unless specifically provided for in the specifications or the contract, or supplemental contracts.

Bids will be received for the entire work only, and each blank must be filled.

The quantities of each item of the proposal, as finally ascertained at the close of the contract, in the units given and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.

United States Engineer Office, 250 Old Land Office Building, Washington, D. C., October 6, 1924.

[fols. 55-56] III. GENERAL TRAVERSE—Filed August 15, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Francis M. Shea, Assistant Attorney General.

#### IV. ARGUMENT AND SUBMISSION OF CASE

On December 8, 1943, the case was argued and submitted on merits by Mr. Herman J. Galloway, and Mr. George R. Shields, for plaintiff, and by Assistant Attorney General Francis M. Shea for the defendant.

[fol. 57] V. **Opinion of the Court by Madden, J. and Dissenting Opinion by Littleton, J.**—Filed January 3, 1944

*Mr. Herman J. Galloway and Mr. George R. Shields* for the plaintiff.

*Mr. Assistant Attorney General Francis M. Shea* for the defendant. *Mr. Philip Meehem* was on the brief.

#### OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This suit is here by virtue of a special act of Congress, the text of which is quoted later in this opinion. The facts preceding the enactment of the special act were as follows:

The plaintiff made a contract with the Government dated December 3, 1924, to construct a tunnel for the supply of water for the District of Columbia. The work was completed in 1927. The plaintiff claimed that the Government had in various ways breached the contract and he brought a suit (K-366) in this court, asking for damages in the sum of \$306,825.33. The case was tried and the court rendered a judgment for the plaintiff for \$45,174.46, accompanied by an opinion which dealt with the issues in the case (76 C. Cls. 64). The plaintiff made several motions for new trials, which were denied. Written opinions accompanied two of the denials (81 C. Cls. 658; 86 C. Cls. 18). The plain-

tiff petitioned the Supreme Court of the United States for a writ of certiorari to review this court's decision. The Supreme Court denied the petition (303 U. S. 654). All of the foregoing steps in the litigation were taken under the general legislation conferring jurisdiction on this court, [fol. 58] subject to review by the Supreme Court (28 U. S. C. §§ 250, 288). The amount of the judgment rendered by this court in favor of the plaintiff was paid to him.

In 1942 the plaintiff secured the passage of the special act of Congress under which this suit is brought. The text of the act is as follows:

#### AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the

tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date [fol. 59] of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

It is apparent that the suit which is now before us has already been litigated to a final judgment in this court, under the court's general jurisdiction, and the right to seek a review of the judgment in the Supreme Court, which is also granted by a statute of general application, has already been exercised and the review denied. The plaintiff seeks to justify his attempt to obtain a second and more favorable judgment from a court which has already heard, determined, and rendered final judgment in the same litigation, by pointing to the special act.

The history recited above presents a problem as to the power of Congress, under the Constitution, to do what the special act attempts to do. The text of the special act is quoted above. A rereading of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add

the results, and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations. Thus a second serious question [fol. 60] as to the Constitutional power of Congress is presented.

The Government urges that we avoid the constitutional issue by construing the act to mean only that a new trial is granted to the plaintiff by the act, in which new trial the court will be free to decide, in the usual manner of a court, the questions of law and fact involved in the case. Counsel for the plaintiff, though in their original brief they said, as to one item of the claim "The Act appears mandatory that such cost be now allowed," and expressed, though less peremptorily, a similar view as to other items, seemed to take the position at the oral argument and in their final brief that the court could, under the act, exercise a considerable power of decision if it would take jurisdiction of the case.

While we recognize that a court should make every proper effort to give to a statute a construction which keeps it clear of serious constitutional questions, we are unable to so construe the special act. We think that the language of Section 2 is plain, and is, as the plaintiff originally contended, mandatory as to how the case must be decided if the court undertakes the jurisdiction which the act purports to confer. We are not willing to distort the plain meaning of language, for the purpose of evading a troublesome question. We therefore undertake the question as to whether Congress can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce.

We refer first to *United States v. Klein*, 13 Wall. 128. Under a general statute of 1863 and Presidential proclamations issued pursuant thereto, Klein, by virtue of his oath of allegiance and a resulting Presidential pardon, was entitled

to sue in this court for property captured by the Union Army during the Civil War. He did so sue and recovered a judgment. The Government appealed the case to the Supreme Court. While the appeal was pending, Congress in 1870 passed an act providing that no pardon should be admissible to establish any claim against the United States, and that when any pardon had been granted to a person suing under the act of 1863, which pardon recited that the recipient "took part in the late rebellion" and which pardon [fol. 61] had been accepted in writing without express disclaimer, by the recipient, of guilt, the pardon should be conclusive evidence "that such person did take part in . . . the late rebellion" and upon proof of the pardon and the acceptance of it the jurisdiction of the court should cease and the court should forthwith dismiss the suit.

The Government urged that the Supreme Court should dismiss the suit. Instead, that court affirmed the judgment of this court and held the 1870 Statute unconstitutional. The opinion, delivered by Chief Justice Chase, said:

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the

Judicial Department of the government in cases pending before it?

We think not; \* \* \*

The Chief Justice also said:

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress [fol. 62] shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

We think that the Supreme Court's decision in the *Klein* case is applicable to and decisive of the question before us. The fact that in the *Klein* case the statute attempted to take away a right of recovery from the person who was suing the Government, while in our case the statute attempts to confer a right of recovery upon such a person, must be immaterial. The ground of decision in the *Klein* case was the attempted encroachment, by one of the three independent branches of the Government, upon another; the effort of Congress to decide a law suit while it was pending in a court. The fact that in the *Klein* case the statute was enacted while the case was still pending on appeal in the Supreme Court, while in the instant case the statute was enacted some years after the case had been finally adjudicated, cannot be a basis of distinguishing the cases. Everything which the Supreme Court said in the *Klein* case, in which the suit was a pend-

ing one, could be applied with even greater emphasis to a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently.

While counsel for the plaintiff have not seriously urged that the doctrine laid down in the case of *Williams v. United States*, 289 U. S. 553, has any important bearing upon the question here presented, we nevertheless give brief attention to that question. In that case the Supreme Court held that this court was a legislative court, not created under the provisions of Article III of the Constitution of the United States, and that therefore the salaries of its judges could be reduced during their tenures of office. The Supreme Court said (p. 561):

[fol. 63] It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum every year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable.

But these considerations, though obvious enough, are not sufficient, standing alone, to support a conclusion that the Court of Claims comes within the reach of the judicial article in respect of tenure of office and compensation. The integrity of such a conclusion must rest not upon its desirability, but upon its conformity with the provisions of the Constitution.

We do not attempt to explain the decision in the *Williams* case, because, and we say it with deference, we do not pretend to understand it.<sup>1</sup> In any event, the language of the Supreme Court in the *Williams* case, and the fact that that language was uttered in the course of the decision

<sup>1</sup> Compare *U. S. v. Klein*, 13 Wall 128, 144-145; *U. S. v. Union Pacific R. R.*, 98 U. S. 569, 603; *Miles v. Graham*, 268 U. S. 501. But see *Ex parte Bakelite Corporation*, 279 U. S. 438.

of a case certified to the Supreme Court by this court, would seem to leave no room for doubt that this court is a court, in fact as well as in name, and that its decisions are judicial decisions. If it were not, the Supreme Court would not review its decisions,<sup>2</sup> as it does, and has done since the amendment, in 1866, 14 Stat. 9, of the statute defining the jurisdiction and powers of this court. *United States v. Jones*, 119 U. S. 477. And we would suppose, unless the decision in the *Williams* case means the contrary, that we are no more acting as a mere agent or arm of the legislature, when we decide our cases in the first instance, than is the Supreme Court, when it, under the appellate procedure prescribed in the statute,<sup>3</sup> decides them finally. Each court is assigned its place in the process of doing [fol. 64] justice between the United States and those who have claims against it. That is the major portion of this court's assignment. It is only a small part of the Supreme Court's assignment. But one, when it is performing that assignment must be acting judicially, if the other is.

The special act here in question provides, in Section 4, that from this court's decision, a writ of certiorari may be applied for in the Supreme Court, as in other cases. But if the Congressional mandate of Section 2, which directs this court how to decide the case, is valid, and is followed by this court, it would equally, it would seem, be binding upon the Supreme Court. There would be little chance of error, since only mathematical computation is left to the court, hence, the provision for certiorari in Section 4 is perhaps not important.

Perhaps we have discussed the question presented by this case as if it were a dry question of constitutional theory. It is not. It is a question of whether this court, which has for some eighty years been entrusted with the responsible and dignified function of doing justice between the United States and those who bring suit against it, is going to be permitted to perform that function with the independence and single-mindedness to justice which the task deserves. It is a question of whether the judges

<sup>2</sup> *Hayburn's Case*, 2 Dall. 409; *Gordon v. U. S.*, 117 U. S. 697 (see the opinion of Chief Justice Taney in *Gordon's* case, printed in 117 U. S. 697); *B. and O. R. R. v. Interstate Commerce Commission*, 215 U. S. 216.

<sup>3</sup> 43 Stat. 939, 28 U. S. C. § 288.

of this court may continue to decide their cases as their consciences, and such acumen as they have, may lead them to decide, with the confidence that their decisions will be reviewed in the traditional judicial way, with both sides of the controversy presented to the reviewing tribunal; or must, on the other hand, feel that they must weigh in the scales the ability, energy, and persistence of the parties to the suit and their counsel, since they may, in a naturally completely partisan effort, obtain a hearing before a committee of Congress, at which hearing the other side of the controversy is not presented, and secure legislation setting aside the judgment of the court and directing the court to put its indorsement upon the judgment of members of another branch of the Government.

This court is, of course, as prone to error as any other. Its decisions are, as are those of other courts, sometimes erroneous, and sometimes unjust. A litigant in any court is subject to such a hazard. But the unusual procedure followed in this case is still more hazardous, as may be shown by considering just one of the items of plaintiff's claim. Item 2 of his claim, as summarized in paragraph VI of his petition is for

- |  |             |
|--|-------------|
| 2. Excavation of materials which caved in over |             |
| the tunnel arch, 4,781 cubic yards at          |             |
| \$17.00  | \$81,277.00 |

By section 2 of the special act, this court is, in effect, directed to render a judgment for that amount. Yet we venture to say that no court, left free to decide the question according to law and justice would decide that the plaintiff should recover one dollar upon that claim. The relevant facts are that, in the process of excavating the tunnel, large amounts of earth and rocks caved in from the roof of the tunnel. These cave-ins occurred through no effort of the plaintiff, and, he claims, in spite of his efforts to prevent them. On the former trial of the case in this court, the plaintiff himself testified that:

The specifications described the B line as being the outside limiting line for which payment for excavation will be made. If any excavation is made outside that line, either by mistake or by the ground caving in, no payment is made beyond that line. That line is the limiting line for pay.

He further testified that the Government's contracting officer had said he "hoped to find some other method of filling that space over the rock section that would be less expensive than filling it with dry pack and grout" but that plaintiff protested against this because:

The manner provided in the contract for reimbursing me for hauling out of the tunnel whatever rock or earth fell into it was covered in the compensation allowed me for dry packing and grout.

He further testified, with reference to a ruling (later rescinded) by the contracting officer that no grout should be put in the dry packing in the rock sections, that he complained to the contracting officer that such a ruling would cause him loss because, he testified,

All this preparatory work that I had done would not be paid for; that is, I was paid for no excavation that fell down above the "B" line, all this earth that fell down I was not paid for it under the item of excavation. The only way I would get paid for removing that earth [fol. 66] that fell down was when I refilled it with dry packing and grout and my price for grout included the cost of removing that earth from the tunnel.

On his cross-examination the questions and answers relating to the same matter were as follows:

625. XQ. You said in your testimony that the only way for you to get paid for the earth which you took out, the excess earth above the B line, was to grout with stones.

A. Yes, sir.

627. XQ. And you were being paid \$3 a bag for cement used in grouting and that cement cost you 80 cents, didn't it?

A. The cement alone cost that, but there were other materials. The cement was only a guide, a measure. There was the sand and there was labor, and equipment to put it in, and besides that, that was computed to pay for the cost of the earth, removing the earth that fell in.

628. XQ. Certainly; so that you expected to make enough profit out of the grouting to pay for the falling of the earth; isn't that what you said?

A. No, sir; I expected to be paid. I expected payment for the grout would pay for the earth that fell in, removing the earth.

629. XQ. It would pay?

A. Yes.

630. XQ. In other words, the grout pay would pay you for the labor of removing the excess earth; isn't that what you mean?

A. That is exactly what I have been trying to show for five years.

Plaintiff now presents to the court a congressional direction to give him, in addition to pay for all the dry packing and grouting which he claims he did, and which, as measured would fill the space left vacant by the earth and rocks that fell into the tunnel, more than \$80,000, one-half of the whole amount which the court is directed to pay him, for work for which, by his own construction of the contract, he was entitled to no pay at all, except the pay for dry packing and grouting.

We think that, in a judicial proceeding with both sides represented, a plaintiff would hardly ever recover a judgment for \$80,000 upon a claim which had no basis whatever. And we think we should not be directed to indorse that kind [fol. 67] of a judgment, arrived at by members of another branch of the Government. Each branch of the Government will, inevitably, make mistakes, but each should take, and keep, the responsibility for the mistakes it makes.

Under the decision of the Supreme Court in the *Williams* case, *supra*, the tenures and salaries of the Judges of this court are at the will of Congress. We would be much less than worthy of the trust which has been reposed in this court since the year 1863<sup>4</sup> if we should also subject our decisions to the will of Congress.

<sup>4</sup> Act of March 3, 1863; 12 Stat. 765. President Lincoln in a message to Congress on December 3, 1861, said:

"It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in

In the view which we have taken of Section 2 of the special act, it is not necessary for us to decide, and we do not decide, whether an act which merely granted a new trial, without directing the court how to decide the case upon the new trial, would or would not be an infringement upon the judicial powers of the court.<sup>5</sup> In the case of *Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447, all members of the court were of the opinion that such an act would be unconstitutional if its effect was to deprive a claimant against the United States of a judgment which he had recovered, though they differed in their views as to whether the act there in question did grant a new trial. We think that an act directing the court to re-try the issues of a case, which issues were or should have been tried the first time would, regardless of whether the Government or the plaintiff sought the new trial, be no less dangerous to the independence of the court as a judicial body, than a direction to the court as to how it must decide a pending or previously adjudicated case. It likewise would require the court, when it was first deciding the case, to keep its mind, not solely on the law and the facts of the case, but also on the question of [fol. 68] how its decision would look to the members of another branch of the Government, when presented to them in partisan fashion without the safeguards which accompany judicial review.

What we have said is said with the complete respect which is properly due the legislative branch of the Government. We have no feeling that there is involved in this case any

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their nature belong to the judicial department. Besides, it is apparent that the attention of Congress will be more than usually engaged for some time to come with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final."

The act of 1863 referred to at the beginning of this note was the result of this message.

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<sup>5</sup> See *Cherokee Indians v. United States*, 270 U. S. 476, 486.

intentional effort to infringe upon the proper exercise by this court of its assigned duties in our scheme of government. The Congress has its problems, difficult and pressing. From the very nature of our work, we have opportunities for deliberate consideration of particular cases, which, as we understand, Congress has not. We desire only to be permitted to act as a court.

It follows from what we have said that the plaintiff's petition must be dismissed.

It is so ordered.

WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

#### DISSENTING OPINION

LITTLETON, *Judge*, dissenting: I cannot concur in the opinion of the majority dismissing the petition for lack of jurisdiction to consider it notwithstanding the Special Jurisdictional Act of February 27, 1942. I do not construe the special act as in any way infringing upon the Judicial Department of the Government or upon the proper exercise by the court of its judicial duties. On the contrary, I construe the act as an authorization by the lawmaking Departments of the Government to the court to consider plaintiff's claims in the light of the waivers by the Legislative and Executive Departments of the Government of limitations, *res adjudicata*, and certain rights and defenses of the Government, mentioned in Sections 1 and 2 of the act, which the Government, as the defendant in the suit, might otherwise bring forward and successfully insist upon in opposition to the jurisdiction of the court and the right of plaintiff to make and maintain the claims. I do not think Congress intended to go, and I do not find anything in the special jurisdictional act which goes, beyond this. Section 1 of the act is a grant of jurisdiction and authority to hear, determine, [fol. 69] and enter judgment notwithstanding certain defenses mentioned therein, including the waivers of defenses which might otherwise be made, as more specifically described in Section 2 of the act. No special significance should be attached to the word "directed" appearing in the first clause of Section 2. Section 1 conferred the jurisdiction and authority to be exercised by the court and section 2 simply described in detail the basis of the liability which the Government, acting through the Legislative and Execu-

five Departments, was willing to assume in the circumstances, and by this section 2 the Government consented to be charged on the basis specified in accordance with such findings and such measurements as the court shall make in accordance with the jurisdiction and authority conferred by section 1.

I think it is clear that Congress by an act approved by the President may do this without in any way interfering with the proper judicial function of the court although the reason of Congress in so doing is purely moral or equitable rather than legal, and, notwithstanding the plaintiff has once lost his case in this court in a suit under the contract. It seems to me that the Sovereign, which acts through its Legislative and Executive branches in respect of the institution of suits against it and through the Judicial branch in the determination and adjudication of claims against it, in such suits, is not exactly in the same situation as a private litigant might be in regard to the matter of assuming a liability, or liabilities, on a specified basis and authorizing and empowering this court to adjudicate and determine such assumed liabilities in a second suit. The provisions of the Special Act of February 27, 1942, now form the legal basis for the adjudication of the claims presented in the petition filed thereunder. *Alcock v. United States*, 74 C. Cls. 398. See, also, *Cherokee Nation v. United States*, 270 U. S. 476, 486. I do not think the case of *United States v. Klein*, 13 Wall. 428, is in point here.

[fol. 70] For the reason stated I think the court has jurisdiction and authority in the premises and should proceed to hear, determine, and enter judgment under the provisions of the jurisdictional act and upon the record in the case.

JONES, *Judge*, took no part in the decision of this case.

#### [fols. 71-72] VI. JUDGMENT OF THE COURT—January 3, 1944

At a Court of Claims held in the City of Washington on the 3rd day of January, A. D., 1944, judgment was ordered to be entered as follows:

It Is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File No. 48,177—Court of Claims. Term No. 684. Allen Pope, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed February 10, 1944. Term No. 684, O. T. 1943.

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[Vol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this Court under Article III of the Constitution.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1361)



FILE COPY

Office - Supreme Court U.S.

CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. [REDACTED] 26

ALLEN POPE,

*Petitioner,*

*vs.*

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS AND BRIEF IN SUPPORT  
THEREOF.

GEORGE ROBERT SHIELDS,  
*Counsel for Petitioner.*

HERMAN J. GALLOWAY,  
JOHN W. GASKINS,  
FRED W. SHIELDS,  
*Of Counsel.*

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

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**No. 684**

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**ALLEN POPE,**

*vs.*

*Petitioner,*

**THE UNITED STATES,**

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.**

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The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

**Opinion Below.**

The opinion of the Court of Claims (R. 47) is not yet officially reported.

**Jurisdiction.**

The judgment of the Court of Claims was entered January 3, 1944 (R. 60). The judgment of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

### Question Presented.

The single question involved in this case is: Is the Special Act of February 27, 1942 (*post.* p. 2), constitutional?

### Statute Involved.

The only statute involved is the Act of Congress, approved February 27, 1942 (Private Law 306, 77th Congress) reading as follows:

#### "An Act

"To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed, as to lower the

upper 'B' or 'pay' line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases."

### **Statement.**

The petitioner was a contractor with the United States for the construction of a tunnel forming a part of the Washington water supply system, in the construction of which a number of disputes arose between him and the contracting officer. These, not being settled to the satisfaction of the petitioner, were carried to the Court of Claims. That court considered the claims submitted, allowing some of them and disallowing others, including those now asserted (76 C. Cls. 64). Motions for new trial were filed but were denied. Petitioner, without the aid of counsel,

unsuccessfully sought a review of the matter by the Supreme Court (303 U. S. 654).

Thereafter he sought relief from Congress, and the Special Act (*ante*, p. 2) was enacted.

A petition under the Special Act was thereupon filed in the Court of Claims (R. 1-9), and some additional testimony was taken. Without making any findings of fact, the Court of Claims rendered the decision now complained of (47). The court in effect held (Judge Littleton dissenting) that the Special Act was unconstitutional in that it was a legislative direction of judicial action.

### **Specification of Errors to Be Urged.**

The Court of Claims erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.

2. In holding in effect that the Special Act was unconstitutional and void, as an unauthorized direction by the Congress of a judicial function.

3. In failing to render a judgment on the claims.

### **Reasons for Granting the Writ.**

1. The decision of the court below involves an important constitutional question, and is therefore of the class of cases which this Court will customarily review.

2. The decision of the court below is erroneous and is in conflict with a long line of earlier decisions by that court and with what should be regarded as settled law on the subject.

3. The questions presented are of wide importance and are of a kind that have not been passed upon by this Court.

**Conclusion.**

The assigned errors, and reasons for granting the writ asked will be discussed in the short brief accompanying this petition. The writ should be allowed.

GEORGE ROBERT SHIELDS,  
*Attorney for Petitioner.*

HERMAN J. GALLOWAY,  
JOHN W. GASKINS,  
FRED W. SHIELDS,  
*Of Counsel.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 684

ALLEN POPE,

vs.

*Petitioner,*

THE UNITED STATES,

*Respondent.*

**BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

**1. Assignments of Error.**

- (a) *Does the Special Act Involve an Unwarranted Legislative Direction to the Court of Claims?*

The answer is "No." The Special Act involves no *direction* to the court except to render a judgment, *for or against* this petitioner. The Special Act purports to do only three things—all of which would seem within the authority of Congress and none of which is outside of such authority—

(1) Congress, representing the Government, recognizes that an obligation exists upon certain claims and gives the Court of Claims jurisdiction to determine and render judgment thereon; (2) the act waives certain defenses, i. e., *prior adjudication*, lapse of time, etc.; and (3) the act

directs judgment, not *for* or *against*, but judgment on certain prescribed claims.

There is no direction for a *rehearing* of old and previously decided claims. The direction is for a *hearing* of a *new* case—on the basis of the testimony in the *old* case, plus any *new* testimony in the *new* case. The lower court seems to have concluded that this was an unwarranted impingement by the *legislative* upon the *judicial* branch of Government as telling it, a court, what to do.

Petitioner submits that nothing in the act can properly be construed as a direction by Congress (approved by the Executive) to do or not to do a particular thing. Congress has created an obligation where the Court of Claims had said no obligation previously existed. Congress is certainly authorized to create obligations of the United States. Congress has here recognized that at least a moral or equitable obligation exists and has provided that such obligation should be enforced by the Court of Claims and has given the Court of Claims jurisdiction to enforce the same.

The act is plain and not substantially different from scores of earlier acts. Congress was only doing what the court often before had accepted as proper. The Court of Claims has only the jurisdiction and authority given it by Congress. The Special Act involves only a legislative enlargement of the court's *jurisdiction*, and not a *restriction* on its judicial prerogatives.

#### (b) *Is the Special Act Constitutional?*

The Court of Claims is a *legislative* court (*Williams v. United States*, 289 U. S. 553). Nothing in the *Klein* case, 13 Wall. 128, lends support to the conclusion that the Court of Claims, a creature of Congress, is immune from proper directions by its creator. Even assuming that the *legisla-*

the exercise of a *judicial* function, the question would still remain: May the Congress, as here, give authority to the Court of Claims to consider as a new cause of action certain claims as to which no such jurisdiction could otherwise exist?

The question seems to be self-answered. The Special Act here involved was a constitutional exercise by Congress of the authority it had, and involved no infringement or curtailment of constitutional judicial functions, dignities or authorities.

## 2. Reasons for Granting Writ.

### (a) *A Constitutional Question.*

The conclusion of the lower Court by every inference, but with some reserve as to words, is that the Special Act here involved constitutes an unconstitutional infringement by the *legislative* branch of a *judicial* function pertaining to the judicial branch. It cannot be doubted, therefore, that the question here involved is a constitutional question of a kind that this Court should review.

### (b) *Decision in Conflict with Earlier Decisions.*

Over a long period, dating from the creation of the Court of Claims, Congress has again and again, and many times, given that Court jurisdiction to consider claims or cases, which on one account or another—lapse of time, prior adjudication, etc., would otherwise be barred. No other case has been found where the Court of Claims declined to accept the jurisdiction conferred or to pursue the course indicated by such special act.

In *Nock v. United States*, 2 C. Cls. 451, a special act referred to the Court "for its decision in accordance with

principles of equity and justice", a claim which had therefore been disallowed (1 C. Cls. 71). Under the special act a judgment was awarded in Nock's favor.

In *Alcock v. United States*, 74 C. Cls. 308, the facts were quite similar. Notwithstanding a prior judgment in the same matter, the Court, under the special act, reconsidered the matter and awarded judgment in Alcock's favor.

The case of *De Luca v. United States*, 84 C. Cls. 217, is exactly in point, except that there was no indication in the special act of the basis to be followed by the Court in arriving at the intendment of the act. De Luca, an Italian, under comity of remedy, had sued the United States, but had been denied a recovery by that Court. He thereupon obtained the passage of a special act giving the Court of Claims "jurisdiction to hear and determine the claim of Carlo De Luca and to award him just compensation for losses and damages, if any," on certain specified accounts, notwithstanding lapse of time, prior settlements, laches or *res judicata*. Although the Court had previously considered this identical claim, it thereupon tried the case again and awarded a large additional judgment to De Luca. One may wonder why the Court's present objections were not raised then.

*Mack Copper Company v. United States*, 97 C. Cls. 451, is identical in fact except that in that case, while an additional amount was found due the plaintiff, a balance in excess of such amount was found due the United States, so there was no net judgment in favor of the plaintiff. The special act (then unquestioned) there was very much on all-fours with the special act now held invalid by the Court of Claims.

There are numerous decisions to like general effect: *Boudinot v. United States*, 18 C. Cls. 716; *Murphy v. United States*, 35 C. Cls. 494; *Southern Pacific Co. v. United States*.

68 C. Cls. 223; *Garrett v. United States*, 70 C. Cls. 304; *Edwards v. United States*, 79 C. Cls. 436; *Mansfield, et al. v. United States*, 89 C. Cls. 12; *Hawkins, et al., Receivers of Norfolk Southern Railroad Company, v. United States*, 96 C. Cls. 357; *Nolan Bros. Inc. v. United States*, 98 C. Cls. 41. A general discussion of the matter of jurisdiction is found in *Pocono Pines Assembly Hotels Company v. United States*, 73 C. Cls. 447.

As above stated, no case before this has been found where the Court of Claims has declined to accept the added jurisdiction conferred upon it, or to proceed in whatever manner was indicated by such special act. Question: Was the present act properly disregarded by the Court of Claims as an unauthorized Congressional direction to it? The answer is that the Court of Claims being a legislative court and hence an arm of Congress, is subject to the will and direction of Congress in all matters affecting legislative action.

The case of *Grant v. United States*, 18 C. Cls. 732; *United States v. Grant*, 110 U. S. 225, involved a plain legislative direction to the Court of Claims "to reopen and readjudicate" a case theretofore decided eighteen years earlier (5 C. Cls. 80). Pursuant to such act the Court did "reopen and readjudicate" the case making an additional allowance of \$14,016.29. The Government filed an appeal. The Supreme Court dismissed the same, saying:

"Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate the new part of the judgment can be separated from the old for the purposes of review here."

Neither the Court of Claims nor the Supreme Court indicated any thought that the direction by Congress was otherwise than proper.

(c) *Case of General Interest.*

Many cases, particularly Indian claims, are arising under special acts. A final decision as to the proper interpretation of such special acts is therefore of wide and large general interest.

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SEP 21 1944

CHARLES FLORE CRISLEY  
CLERK

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 26.

ALLEN POPE, PETITIONER,

v.

THE UNITED STATES.

*On Writ of Certiorari to the Court of Claims.*

**BRIEF FOR PETITIONER.**

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OCTOBER TERM, 1944.

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THE UNITED STATES, *Respondent*.

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*On Writ of Certiorari to the Court of Claims.*

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**BRIEF FOR PETITIONER.**

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*Opinion.*

The opinion of the Court of Claims (R. 47-61) is now reported (100 C. Cls. 375).

*Judgment.*

The judgment of the Court of Claims was entered January 3, 1944, 100 C. Cls. 375 (R. 60). A petition for writ of certiorari was filed February 10, 1944, and was granted April 3, 1944.

*Jurisdiction.*

The jurisdiction of this Court rests upon Section 3(b) of the Act of February 13, 1925, as amended.

*Question Presented.*

Whether the Special Act, Private Law No. 306, 77th Congress, approved February 27, 1942, 56 Stat. 1122, is

constitutional; i. e., whether it was a constitutional exercise by Congress of its legislative function and not an infringement of any judicial prerogative under Article III of the Constitution.

### *Statutory Provisions Involved.*

The Special Act referred to was in terms as follows:

#### **"AN ACT.**

"To confer jurisdiction upon the Court of Claims to hear, determine and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States; as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and to omit timber lagging from the side walls of the tunnel; and for the

work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

"Approved, February 27, 1942."

### *Statement.*

Petitioner at one time had a contract (R. 9-46) for the building of a tunnel forming a part of the water supply of the City of Washington, and in connection with that contract a number of controversies arose between him and the United States, represented by the contracting officer. Not being satisfied with the determinations made by the contracting officer or by the "Head of Department" the Chief of Engineers on appeal, he brought suit in the Court of Claims, and after a lengthy litigation, in which a large record was made, he was awarded judgment for part or all of some of the claims asserted, but not nearly all, the allowance amounting only to \$45,174.46. After repeated

motions for new trial and an attempted certiorari—the amount of the judgment so awarded was appropriated by Congress and paid to petitioner.

In a final motion for new trial, the court ruled (86 C. Cls. 18, 19) as follows:

“We discussed in 81 Court of Claims 658 our inability to grant the new trial, asked for, and we are convinced now, as we were then, that the Court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court.

“The remedy available to plaintiff, in our view of the present status of the record, resides exclusively in Congress and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled.”

In this status, his claims fully barred from further action (Judicial Code, Secs. 178, 179, U.S.C.A., Title 28, Secs. 285, 286) there was introduced in Congress a bill for his relief, which, after hearings before the appropriate committees of the House and Senate, in which *both* sides, not *one*, were represented, there was enacted into law, the Special Act above quoted. (See Committee Report No. 865, 77th Congress, 1st Session, on H. R. 4179, which later became the Special Act now involved, wherein the then Attorney General, now Mr. Justice Jackson, after reviewing the provisions of the bill, said:

“Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions.”)

Under this Special Act petitioner brought a *new* suit in the Court of Claims on July 7, 1942, not for “rehearing” of the old case, but for a total of \$162,616.80 on a *new* cause of action, comprising the following items:

- |    |  |           |
|----|--|-----------|
| 1. | (a) Excavation of caved-in materials between the lines shown on the drawings and the lines as changed which was 3 inches                   | \$ 969.00 |
|    | (b) Excavation of caved-in materials from the side walls due to omission of specified wall lagging   | 4,879.00  |
|    | (c) Filling caved-in spaces with concrete  | 4,879.00  |
| 2. | Excavation of caved-in materials from over the tunnel arch (this item alone is discussed in the opinion of the Court of Claims (R. 55-57)) | 81,277.00 |
| 3. | Filling caved-in spaces over the tunnel arch with dry packing  | 14,240.70 |
| 4. | Filling dry packing in overhead caved-in spaces with grout   | 56,372.10 |

All these items of claim except "2" (excavation of caved-in materials over the tunnel arch) had been included in the original suit and not allowed, because the work, as done, had been allegedly under *oral* not written orders, or for other reasons. Item 2 had been made on a different basis—a claim alleging false representation of subsurface conditions had been made. On such basis the claim had been rejected. This item of claim thus rejected is, under the Special Act on a different basis: Was the work performed, has the Government had the benefit thereof, has it been paid for?

The Special Act directed the consideration of all these items, as a new cause of action, on the evidence in the *old* case plus any *new* evidence that might be taken *on the basis that the work had been performed, that the Government had received the use and benefit thereof, and that the same had not been paid for.*

Some additional evidence was taken tending to establish the last named prerequisite particulars—that the work had been done under orders, that the Government had had the use and benefit thereof, for which it had not paid.

The case under the Special Act was dismissed by the

Court of Claims without findings of fact on the ground that notwithstanding the waiver of prior adjudication, lapse of time, etc., included in the Act, Congress could not properly direct the Court, even with the addition of *new* evidence; "to hear, determine and render judgment" on claims that had *therefore been heard and decided by the Court*. It is to be observed that the published report of the case, 100 C. Cls. 375, includes a variety of "History"; etc., that was not a part of the court's decision, and to the correctness of which petitioner has had no opportunity to except. The official record is as reported officially, R. 47-61. The published "record", 100 C. Cls. 375, is not the record for consideration by this Court.

#### *Specification of Errors.*

Petitioner says that the court erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.
2. In holding in effect that the special Act was unconstitutional and void as an unauthorized direction by the Congress of a judicial function.
3. In failing to render a judgment on the claims; i. e., in dismissing the petition of the petitioner based on the Special Act.

#### *Summary of Argument.*

1. In its order granting *certiorari* herein the Court says:

"Counsel are requested to discuss in their briefs and on oral argument the question whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this court under Article III of the Constitution."

The question thus propounded naturally must head the list of matters for present discussion. Or stated in other

words, does the Special Act give the Court of Claims a task requiring the exercise of *judicial* "power" or functions?

Article III of the Constitution provides that

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

and further:

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." (Italics added).

No other provision of the Article would seem to have any bearing on the immediate question. The Court of Claims is one of the "inferior courts" created by Congress, not by virtue of Article III but under other provisions. The power and authority of the Supreme Court is, of course, to be found in large part in this Article.

It would seem that the question now of moment is not so much raised or controlled by the specific language of Article III of the Constitution as by a long line of decisions construing the power of the courts thereunder, the effect of which is that the Supreme Court *may not* review the decision or opinion of a subordinate court on a matter not involving the exercise of a judicial action or function. The question now is, it would appear, did the Special Act here involved confer a *judicial* or a *non-judicial* function upon the Court of Claims; that is to say, did it prescribe for decision matters that are reviewable by this Court under Article III?

It is petitioner's view that the action called only for the exercise by the Court of Claims of judicial functions and is therefore of a nature to permit review by this Court under Article III of the Constitution.

II. The lower court having in effect decided that the Special Act is unconstitutional, it is, regardless of other considerations, for this Court to review *that* decision. This Court has the final word on such a subject.

III. The Special Act is constitutional and proper in so far as it directs the Court of Claims to do thus and so, even if possibly unconstitutional in so far as it attempts, if it does, to prescribe the duty of this, the Supreme Court, to review.

Petitioner will limit his argument to the lines indicated. He will assume, without argument, on the authority of many decided cases, that the Supreme Court may not properly be called upon to review a question decided by a lower court which is of a *non-judicial* character; in other words, that this Court may not properly be directed to review a decision of a subordinate tribunal which does not involve the exercise of a *judicial function*.

The crucial question, stripped of all surplusage of words would seem to be: Does the Special Act go beyond what the Congress, under Article III of the Constitution, may prescribe for the Court of Claims? The petitioner says it (the Act) is not void for such or other account.

Petitioner will further take the position that the Special Act here involved was an exercise by Congress of its right to create a new cause of action against the United States where none existed before, and that the Special Act here involved merely sends a cause of action so created to the Court of Claims for determination and judgment along the lines and on a basis thereby indicated. He will say that the action of the Court of Claims in pursuance of such direction (1) is a matter properly reviewable by this Court, or (2) if not so reviewable, was, in any event, a proper direction to the Court of Claims.

## ARGUMENT.

1. *The action authorized by the Special Act involves the exercise by the Court of Claims of judicial functions, and hence is of a nature to admit of review of this Court.*

### *Judicial Function.*

What is a "judicial function"? The term is so generally understood that the courts have but infrequently defined it. A short and understandable definition is that when it becomes necessary (for a court) to *determine* a question of fact or law, the act is "judicial", i. e., calls for the exercise of a "judicial function."

In *Crossen v. Wasco County*, 10 Oregon 111, 116, it was ruled that a county court exercises "judicial functions" when it makes its order, or decision in allowing or rejecting claims which it is invested by statute with the special duty or authority to annul or allow.

In *Lyon v. City of Payette*, 38 Idaho 705, the term "judicial function" was defined as being the hearing of an action pending between adverse parties, applying the law to the facts and making and rendering a judgment determining the rights of the parties.

In *Hamma v. People*, 42 Colo. 401, a leading case, it was said that "when an officer acts in both a judicial and ministerial capacity, he may be compelled to perform the ministerial acts in a certain way, but when he acts in a judicial capacity he can only be required to proceed; the manner of his doing so is left entirely to his judgment."

In *Hearst Publications v. National Labor Relations Board*, 136 Fed. (2d) 608, 612, it was said that the determination of the meaning of a particular term "employee", as used in the National Labor Relations Act, is exclusively the exercise of a "judicial function."

In *Actna Life Insurance Company v. Haworth*, 300 U. S. 227, 240, it was said:

"In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn v. United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co. v. Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild v. Hughes*, 258 U. S. 126, 129; *Massachusetts v. Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskat v. United States*, *supra*; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 162; *New Jersey v. Sargent*, 269 U. S. 328, 339, 340; *Liberty Warehouse Co. v. Granis*, 273 U. S. 70; *New York v. Illinois*, 274 U. S. 488, 490; *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274, 289, 290; *Arizona v. California*, 283 U. S. 423, 463, 464; *Alabama v. Arizona*, 291 U. S. 286, 291; *United States v. West Virginia*, 295 U. S. 463, 474, 475; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324."

Surely to take evidence and hear and decide a given claim as directed by the Special Act can be nothing other than the exercise of a "judicial function" as defined in the cases above mentioned.

In *Mitchell Coal & Coke Co. v. Pennsylvania Railroad Co.*, 230 U. S. 247, legislation was said to consist in laying down laws or rules for the future while a "judicial function" is

confined to injunctions, etc., preventing wrongs for the future and judgments giving redress for those for the past.

The Special Act is entitled "An Act to confer jurisdiction upon the Court of Claims to *hear, determine, and render judgment*" upon certain specified claims of the petitioner not to *rehear or retry* old claims, and provides "That jurisdiction be, and the same is hereby conferred upon the Court of Claims" to do just this. The claims so referred were barred except for the Act, both by the statute of limitations, *res judicata*, and by the acceptance of payment. All these defenses were waived by the Act and a *new cause of action* was created.

### *What is Jurisdiction?*

Jurisdiction is the power to decide a case either way, as the merits may require. *United States v. Arredondo*, 6 Pet. 691; *Cooper v. Reynolds*, 10 Wall. 308; *The Fair v. Kohler Die and Specialty Co.*, 228 U. S. 22; *Erickson v. United States*, 264 U. S. 246.

Of its own jurisdiction, the Court of Claims in *Gordon v. United States*, 26 C. Cls. 307, 309, said:

"The jurisdiction of the court is subject to the will of Congress, the court not having a constitutional grant of judicial authority; and whatever statutes may be in force at the time a case is adjudicated measure the jurisdiction of the court in the discharge of its official duty. There can be no vested right in the remedial process of the law; it is subject to change at the will of the legislature, whose discretion as expressed in the statutes marks the boundaries of the power of the court."

The case was appealed to the Supreme Court, 2 Wall. 561, where it was dismissed for want of jurisdiction with the comment "that the reasons which necessitated this view might (may) be announced hereafter."

In 117 U. S. 697, an opinion, written by Chief Justice

Taney, and approved after his death by the surviving judges, gave the reasons. It was therein said (704, 705):

"And it is very clear that this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

"Indeed no principle of constitutional law has been more firmly established or constantly adhered to, than the one above stated—that is, that this Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

"The Constitution of the United States delegates no judicial power to Congress. Its powers are confined to legislative duties, and restricted within certain prescribed limits. By the second section of Article VI, the laws of Congress are made the Supreme law of the land only when they are made in pursuance of the legislative power specified in the Constitution; and by the Xth amendment the powers not delegated to the United States nor prohibited by it to the States, are reserved to the States respectively or to the people."

In *Western Cherokee Indians v. United States*, 27 C. Cls. 1 (affirmed 148 U. S. 427), it was said (p. 36):

"And if the enactments above quoted stood alone, it is possible that we might reach the conclusion that Congress intended here to invest the court with extra-judicial power. But the jurisdiction of the Supreme Court, defined by the Constitution, is strictly judicial, and statutory authority can neither take away from nor add to the inherent powers of that tribunal (*Gibbs*).

*don's Case*, 2 Wall. R. 561; 7 C. Cls. R. 1; 117 U. S. R. 697; *Klein's Case*, 13 Wall. 128). The statute which confers this jurisdiction likewise provides that whatever judgment may be rendered, whether for the claimants or the defendants, may be appealed to the Supreme Court."

"The questions, therefore, to be determined in this court are necessarily questions which may be reviewed in the Supreme Court, and the 'unrestricted latitude' conferred by the statute 'in adjusting and determining the said claim' must be deemed the unrestricted latitude of a court of equity in stating an account, distributing a fund, and framing a decree so comprehensive and flexible as to secure to each suitor his joint or individual rights."

The case of *United States v. Klein*, 13 Wall. 128, was much relied upon by the lower court as authority for the position it took with reference to the Special Act here in question. As said by Judge Littleton, dissenting, the conclusion in that case has no controlling application to the present one. In that case Klein had been awarded a judgment by the Court of Claims and an appeal had been taken by the United States to the Supreme Court. While this appeal was pending, Congress passed an act intended to nullify the effect of pardons (a basis for the judgment) theretofore granted by the President under lawful authority.

This act provided that where suit had been brought in the Court of Claims for the recovery of abandoned or captured property under an earlier act, and the claimant had accepted a pardon, "such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims; and on appeal therefrom conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof

of such pardon and acceptance "the jurisdiction of the court in the case shall cease," etc., and the court will dismiss the suit of such claimant.

After reciting pertinent acts and the history of the Court of Claims up to that time (1871), the Court said (pp. 145-147):

"The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.

"Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make such exceptions from the appellate jurisdiction as should seem to it expedient.

"But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of

pardon or acceptance, summarily made on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause, for want of jurisdiction.

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

"It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make.'

"Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."

It is to be observed that neither in the court's quotation from the decision of the *Klein* case (R. 51, 52) nor in the quotation we have made, *supra*, appears one paragraph

that has particular application to the situation here existing. It is as follows (13 Wall. 146):

"We do not at all question what was decided in the case of *Pennsylvania v. Wheeling Bridge Company*, 18 Howard, 429. In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance, and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us (the *Klein* case) no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary."

In the present case, petitioner, as the law then existed, had completely exhausted whatever legal rights and remedies he had; and Congress thereupon enacted this Special Act giving him a new cause of action. Whether the court below was right in its decisions in the old case, as the law then stood, is a matter quite aside from any present issue. The rights of the petitioner are as created by the Congress under the Special Act. Congress is authorized under Article I, Section 8, Clause 1 of the Constitution to pay the debts and obligations of the Government. It has here validated an obligation, with jurisdiction to the Court of Claims to determine the amount thereof. It has not attempted to prescribe how the court shall exercise a judicial function. It has merely given it authority, previously non-existent, to exercise such jurisdiction.

There can be no doubt that Congress had the right to confer the jurisdiction it conferred in the present case. It would appear plain that the exercise of that jurisdiction

calls for the performance by the Court of Claims of certain acts constituting the exercise of judicial functions and is therefore reviewable by this Court.

*The Special Act—Does it Restrict Judicial Prerogative?*

It is not to be denied that the Special Act is broad in its terms. But, it is submitted, that performance by the lower court of the directions of Congress calls for the exercise by such court of definite judicial functions.

1. It is stated by the court that it is directed to determine and render judgment on a specific basis, i. e., at "contract rates", and it is intimated that performance of this direction would be merely a *ministerial* and not a *judicial* act. This, it is urged, is not correct.

In *The Indians of California v. United States*, 98 C. Cls. 583 (certiorari denied, 319 U. S. 764), the Special Act directed judgment for lands taken, if found taken, "at \$1.25 per acre". The court (p. 599) said of this;

"The amount of recovery has been almost definitely defined. The land which is described in the respective treaties is to be valued at a fixed price. \* \* \* The value per acre is fixed in the jurisdictional act and it is only necessary to ascertain the number of acres \* \* \*"

The court held plaintiffs entitled to recover under the act. The Supreme Court denied certiorari. Surely the present act no more fixed the basis or limits of the jurisdiction of the Court of Claims than was there done.

The direction "to determine" necessarily indicates that there is to be an examination of the facts and the application of the "contract rates" to whatever quantities of materials the court may, upon the evidence, determine to be correct. Similarly under the present act the court is to determine certain requisite facts as to whether the work covered by the asserted claims was performed, whether the Government has had the use and benefit thereof, and whether the same has been paid for. The provisions of

Section 3 of the Special Act are not to be overlooked in this connection. The Court of Claims is there directed to "consider as evidence in such suit any or all evidence theretofore taken by either party," in a specified case "together with any *additional evidence* which may be taken." The *taking of evidence and weighing the same is not a ministerial function, but is purely and exclusively a judicial function.*

The case of *Menominee Indians v. United States*, No. 44298, decided by the Court of Claims February 7, 1944, and not yet appearing in any published report, would appear to bear out what is said above. There, a Special Act, approved September 3, 1935, (49 Stat. 1085) as amended by a supplemental Special Act dated April 8, 1938 (52 Stat. 268), gave elaborate and detailed instruction to the Court of Claims as to the basis for considering certain claims asserted by the Indians on various accounts. Although this decision was later than that in the *Pope* case, the court there made a conclusion, which if applied in the *Pope* case, would have resulted in a *judgment* in Pope's favor instead of a *dismissal of the action* because of alleged unconstitutionality of the Special Act.

The court said.

"We have no doubt that special acts of Congress, and even though retrospective in their operation, are constitutional, if they confer rights on private litigants against the Government, which rights are intended by Congress to fulfill a legal or moral obligation of the Government. See *Indians of California v. United States*, 98 C. Cls. 583, 599. We have no problem here, such as the Supreme Court of the United States had in the case of *United States v. Klein*, 13 Wall. 128; of an attempt by Congress, by the enactment of a statute while litigation was pending, to control the court's decision. This court dealt with a similar problem in the case of *Allen Pope v. United States*, No. 45704, decided January 3, 1944, where the statute attempted to direct the rehearing, and the decision in a specified manner.

of a case in which a final judgment had already been rendered."

It is to be observed that the Special Act here involved does not attempt "to direct the *rehearing*, and the *decision* in a specified manner." The act merely refers certain specified claims for trial and determination. It limits the number of items of work that may be sued for and the maximum quantities of such items. It does not in any way prescribe how the judicial discretions shall be exercised nor does it any more than in the *Menominee* case direct the manner in which the *basis* for a judgment is to be legally arrived at. It is to be observed furthermore that in the *Menominee* case, Section 5 of the Special Act, gave "the absolute right of appeal (not by writ of certiorari) from any final judgment entered by the Court of Claims to the Supreme Court of the United States, and the Supreme Court of the United States is hereby invested with jurisdiction of such appeals." What difference, if any, can there be in legal effect from this provision and that giving the parties the right to *apply* for a writ of certiorari as in the *Pope* case?

2. It is next intimated by the lower court that the direction "the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings" is a definite and precise prescription, both as to the *method* of establishing certain facts and as to the *weight* to be accorded certain evidence pertaining thereto, leaving the court only the ministerial function of "rubber-stamping" what has already been done.

It would seem that the lower court has not well understood the intendment of the Special Act or the language used. The purpose of the Act is reasonably plain. It was to create a new cause of action and to give to the Court of Claims jurisdiction, previously exhausted as to similar items, to hear and determine them. It did not, as indicated by the Court of Claims in *Menominee Indians v. United*

*States*, No. 44298, decided February 7, 1944, "direct the rehearing" or direct a "decision in a specified manner of a case in which a final judgment had already been rendered."

The *old* case was ended—a *new* one was created.

In prescribing how the *amount* of dry packing was to be arrived at, the Congress was not dictating as to method or amount, but was stating only a scientific fact that the court should here take into account, as it did in the *old* case where the court adopted the *liquid* method of measurement as the only possible method to be followed. It is not believed that anything in the language to which the lower court seems to take umbrage can be found subject to any valid objection as an interference with the orderly exercise of a judicial function regularly exercised by the court.

Congress has power to create obligations where none previously existed that are binding upon the United States. In *Indians of California v. United States*, 98 C. Cls. 583, the Court of Claims itself recognized this fact, saying (p. 599):

"It is in the power of Congress to grant any kind of relief which its wisdom dictates. There have been many instances of the recognition of moral claims, even gifts and bounties. Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim, nor can it recognize a case sounding in tort. *Radel-Oyster Co. v. United States*, 78 C. Cls. 816; *Mansfield et al. v. United States*, 89 C. Cls. 12; *Stubbs v. United States*, 86 C. Cls. 152. But the Congress has repeatedly sent tort cases to this Court for adjudication under special jurisdictional acts. The Congress can confer on this Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action." *United States v. Realty Co., supra.*

That is exactly what Congress has done in this Special Act. It has, on the basis that the work was performed, that the Government has had the benefit thereof, and has not paid therefor, recognized the existence of moral or equitable obligations, and has transformed these into obligations

which are binding upon the Government. Congress has then conferred jurisdiction upon the Court of Claims to hear and determine the rights of the parties upon the basis of the obligations so created by it.

3. There are certain other functions involved in compliance with the Special Act that call for the exercise by the Court of Claims of definite *judicial* functions as distinguished from *ministerial* actions. It must be ascertained, first, that the work involved in the claims was performed by petitioner; second, that it has not been paid for; and third, that the Government has received the use and benefit thereof. Certainly these are *ultimate* facts which the court is given authority—a *judicial power*—to determine. This determination, a *judicial function*, the court has failed to make. The court has here made no findings of fact as showing this or other pertinent facts. But it will certainly remain as a part of the court's duty, in the exercise of its *judicial powers*, to determine and decide these pertinent facts.

4. Notwithstanding the lower court's criticism of the act and its conclusions that the same constituted an infringement by the legislative branch upon the functions of the judicial branch, the court proceeds to take up and discuss (R. 55-57) one item of claim, and, apparently *on the evidence in the old case* from which a number of quotations are made, it concludes that *this* item of claim is lacking in merit. In other words, it thus exercises a *judicial function* by a consideration of and a conclusion as to *one* item of claim. Whether or not that conclusion was right or wrong is, of course, not for present discussion. It is mentioned here only as showing that while the court in one breath says that the Act is void because it leaves nothing of a *judicial* nature to be performed thereunder, in the next breath it proceeds *under the act to exercise the very kind of authority* which it says the Act does not confer. If for no other reason, the judgement of the lower court should be reversed.

*The question of the constitutionality of the Act was raised by the Court of Claims.*

It has been many times decided that the courts meet questions as to the validity of legislation as they are raised, but that they do not anticipate them. The power of a court to declare a statute void as in violation of the Constitution should never be exercised except in a very clear case. *Hylton v. United States*, 3 Dallas 171; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Boyd v. Alabama*, 94 U. S. 645.

In *United States v. Reese*, 92 U. S. 214, it was said that Congress is supreme within its legitimate sphere, but if it steps outside of its constitutional limitations and attempts that which is beyond its rights the courts are authorized, and, when called upon in due course of legal proceedings, must annul its encroachment upon the reserved power of the States or the people.

There are many cases to like general effect. It is to be pointed out that the Court of Claims on its own motion here raised the question and attempted to decide the validity of the Special Act of Congress. Neither party to the litigation had, in the argument of the case, suggested such invalidity.

### *Present Special Act not Novel.*

Since the creation of the Court of Claims cases have frequently arisen where, after final judgment by the court, Congress authorized a new action on the same matter. This is the first time of known record that the Court of Claims has questioned the authority of Congress to do so.

The first of such cases is that of *Nock v. United States*, 1 C. Cls. 71; 2 C. Cls. 451.

Nock had a suit in the Court of Claims (1 C. Cls. 71) which was dismissed. Thereafter Congress enacted a Special Act (2 C. Cls. 452) whereby such claim, previously considered and disallowed, is hereby referred to the

Court of Claims for its decision, in accordance with the principles of equity and justice: *Provided*, That said court do not render judgment for a greater sum than is contained in the report of Solicitor Comstock to the Senate, dated December twenty-two, Anno Domini eighteen hundred and fifty-two."

In the course of its opinion on the claim filed under the Special Act, the court said (2 C. Cls. 457, 458):

"If the objections were allowed to rest upon the grounds whereon the assistant solicitor has placed them, I apprehend that they would be found fatal to the case. It is unquestionable that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial *judicially*; neither have they *reversed* a decree of this court; nor attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objections which defeated a recovery before, but that they thus consent upon the condition that the recovery, if any shall be had, shall not exceed a certain amount. The claimant has no rights here except under this consent, and he limits his demands accordingly. If the court should find a larger amount to be due, the excess would be remitted and judgment entered for the amount demanded in the claimant's petition. Apart from this view of the question, it would be enough to say that the defendants cannot be sued except with their own consent; and Congress have the same power to give this consent to a second action as they had to give it to a first."

The recent case of *DeLuca v. United States*, reported 69 C. Cls. 262; 282 U. S. 862; 84 C. Cls. 247, illustrates the hitherto unobjectionable practice.

In the first case (69 C. Cls. 262) plaintiff's petition was dismissed. Certiorari was denied (282 U. S. 862).

Then, there, as here, Congress passed a Special Act giving the Court of Claims jurisdiction to hear and determine and award just compensation for losses and damages, if any, *under the identical matters involved in the prior litigation* "notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made or of *res judicata*, lapse of time, laches or any statute of limitation" with the right of applying for a writ of certiorari by either party.

Thereupon the court reconsidered the same case which it had previously considered and decided, and awarded judgment in plaintiff's favor for over \$1,500,000, with interest on a part thereof. The Court of Claims there raised no point that the act was directing *reconsideration* of a matter previously decided; and neither of the parties in interest thought it worth while to bring the matter to the *attention of the Supreme Court*. Why is not the decision in this case parallel to the question now raised?

Many intervening cases of like effect have arisen, of which only a few need to be noted:

*Grant v. United States*, 5 C. Cls. 71; 18 C. Cls. 732; and *United States v. Grant*, 110 U. S. 225, are worthy of consideration. In the original suit (5 C. Cls. 71) judgment was awarded for \$34,225.14.

Plaintiff was evidently not satisfied with this. Whether the judgment was appropriated and paid does not appear. Thereafter Congress passed a Special Act as follows (18 C. Cls. 738):

"That the Court of Claims be, and is hereby, directed to reopen and readjudicate the case of Albert Grant and Darius Jackson (doing business as A. Grant and Company) upon the evidence heretofore submitted to the said court in said cause (Fifth Court of Claims Reports, page eighty), and if said court in such re-adjudication shall find from such evidence that the court gave judgment for a different sum than the evi-

dence sustains or the court intended, it shall correct such error and adjudge to the said Albert Grant such additional sum in said cause as the evidence shall justify, not to exceed fourteen thousand and sixteen dollars and twenty-nine cents; and the amount by re-adjudication in favor of the said Albert Grant shall be a part of the original judgment in the cause recorded in the Fifth Court of Claims Reports, page eighty."

Plaintiff filed a second petition (18 C. Cls. 732, et seq.). An additional award of \$14,016.29 was entered.

The Government filed an appeal but this was dismissed by the Supreme Court on the grounds (110 U. S. 225) as stated in the syllabus:

"An Act which directs the Court of Claims to reopen and readjudicate a claim, and in case it finds a further amount due that the same shall be a part of the original judgment, confers no right of appeal from the final action of the court under it; and if the time for the right of appeal from the original judgment has expired before appeal from such final action is claimed and taken, the appeal will be dismissed."

Neither court questioned *the power of Congress* to give the directions embodied in the act.

The case of *McKee (heirs of Vigo) v. United States*, (10 C. Cls. 231; 21 Wall. 648; 91 U. S. 442) is an example of where Congress has not merely given jurisdiction but has directed the basis and extent of judgment. It also goes to show that the Supreme Court may review and did review matters of jurisdiction so prescribed.

The original act referring the matter to the Court of Claims is as follows (10 C. Cls. 232):

"Be it enacted, etc. That the claim of the heirs and legal representatives of Col. Francis Vigo, deceased, late of Terre Haute, Ind., for money and supplies furnished the troops under command of Gen. George Rogers Clarke, in the year 1778, during the revolutionary war, be, and the same hereby is, referred along

with all the papers and official documents belonging thereto, to the Court of Claims, with *full jurisdiction to adjust and settle the same*; and in making such *adjustment and settlement* the said court shall be governed *by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official acts if any have heretofore been had in connection with this claim*, and without regard to the statutes of limitation."

The court heard the case and entered judgment. The matter first went to the Supreme Court (21 Wall. 648) as to whether a right of appeal existed. The Supreme Court held that it did. It then went to the Supreme Court again (91 U. S. 442) mainly on the matter of interest. It was not questioned in the Court of Claims or in the Supreme Court that Congress had authority to prescribe what the lower court could or should do and how it should be done.

The case of *Roberts v. United States*, (6 C. Cls. 84; 15 Wall. 384; 92 U. S. 41; 11 C. Cls. 774) has this significance: A private act which referred the claim to the Court of Claims provided:

"that the said court is hereby directed to examine the same, and determine and adjudge whether any, and, if any, what amount is due said trustees for said extra service."

with a proviso

"Provided, That the amount to be awarded by said court shall be upon the basis of the value of carrying other first-class freight of like quantity with the mails actually carried between the same ports at the same time."

In other words, the proviso was a direction as to the basis upon which the claim was to be considered. The Court of Claims after discussing the proviso, said (6 C. Cls. 89):

"The *proviso* does not militate against this view. It does not limit the previous power to determine and adjudge whether *any* amount is due, but merely indicates the rule of damages, if we determine and adjudge something to be due."

Judge Nott (p. 90) dissented, saying:

"The construction of the court gives no effect to an act of Congress. Congress having passed the private act for the relief of the claimants, with knowledge of the facts, as appears by the reports of their committees, and while the claimants' suit upon the same cause of action was actually pending in this court, must be deemed to have thereby ratified the additional service and referred the claim to this court for the ascertainment of the damages, if any, according to the rule expressly prescribed by the act."

The matter in 15 Wall. 384, had to do with right of appeal. This was sustained.

The case, as appearing in 92 U. S. 41, has this to say of the direction to the court as to basis of judgment (p. 49):

"It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred it to the court to decide 'whether any, and, if any, what amount is due.' Still we think it is plain that Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation."

*Murphy v. United States*; 14 C. Cls. 508; 104 U. S. 464; 15 C. Cls. 217; 35 C. Cls. 494. The significance of the case is in this: The original suit (14 C. Cls. 508) was for balances and damages on account of a Navy Department dry dock contract.

The petition was *dismissed*. On appeal to the Supreme Court (104 U. S. 464) the dismissal was *affirmed*, the Supreme Court saying:

"We are clearly of the opinion that the acceptance by the claimant, without objection, of the amount allowed by the Secretary of the Navy, in his adjustment of the account presented to him, was equivalent to a final settlement and compromise of all the items of the present claim included in that account."

Thereupon Congress enacted a Special Act providing (35 C. Cls. 495):

"That the claim of Charles Murphy be *remanded* to the Court of Claims *for a further hearing upon the testimony and papers formerly heard* in said court, and upon such further testimony, including the claimant's evidence, as either party may file, pursuant to the rules of the court; in addition to the authority conferred upon it by existing laws, it shall have equitable jurisdiction of all matters presented by the claimant in his new petition, to be filed within sixty days from the approval of this act; and said court is authorized and directed speedily to render judgment for such amount as right and justice may demand, without reference to any statutes of limitation. And, furthermore, an appeal shall lie from such judgment to the Supreme Court of the United States by either party upon the entire record considered in the Court of Claims (*italics added*).

In pursuance thereof, the Court of Claims *again* heard the case and in its opinion said (35 C. Cls. 494, 506-507):

"The act grants a *rehearing* with *enlarged* jurisdiction and authorizes the court to readjudicate the case upon the testimony formerly heard in said court and upon such further testimony, including the decedent's evidence, as either party may file, pursuant to the rules of the court; and in addition to the authority conferred upon it by existing laws, it shall have equitable jurisdiction of all matters presented by the decedent

in his new petition, 'with authority and direction to speedily render judgment 'for such amount as right and justice may demand, without reference to any statute of limitation,' giving to either party the right of appeal to the Supreme Court 'upon the entire record considered in the Court of Claims.''' (Italics added).

The net result was an additional judgment in plaintiff's favor in the sum of \$17,325. Neither party carried the matter further.

The *Murphy* case would appear to be a good precedent for the situation here involved.

The case of *Alcock v. United States* (61 C. Cls. 312; 74 C. Cls. 300, 308) is another example of where Congress told the Court of Claims *what to do*. In the original case plaintiff's claim was dismissed. Thereupon a Special Act was obtained which provided (74 C. Cls. 309, 310):

"That the Court of Claims of the United States be, and hereby is, given jurisdiction to hear and determine the claim of John L. Alcock, of Baltimore, Maryland, and to award him compensation for losses or damages, if any, which he may have suffered through action by governmental agencies in commandeering, requisitioning, controlling by compulsion or otherwise, allocating or directing the contracting for, or delivery of, spruce and fir lumber, which he owned or had sold under firm and binding contracts to others than allied Governments; and to enter decree or judgment against the United States for such compensation, with interest thereon, notwithstanding the fact that there was no taking by the United States of any of said spruce or fir lumber for the direct use of the United States, and notwithstanding the contracts made by claimant with representatives of the Governments allied with the United States, and notwithstanding the fact that the United States, or any officer, agent, or employee acting in its behalf controlled, allocated, or directed the delivery of said spruce and fir lumber, or directed or required contracts to be made therefor under color of authority, or committed a tort in doing so."

"Sec. 3. \* \* \* Proceedings in any suit brought in the Court of Claims under this act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended."

In pursuance of such directions the court *re-heard* the case, reconsidered its prior decision and made an award of \$163,247.17, with interest. Neither party carried the matter to the Supreme Court. This case should, it would seem, have precluded the objections now raised.

In *Cherokee Nation v. United States*, 270 U. S. 476-486, there had been a prior adjudication (59 C. Cls. 862); awarding judgment with interest at a specified rate. Congress passed a Special Act giving authority to consider the award on a different basis and at a higher rate of interest. The point pertinent here is that the Supreme Court said (p. 486):

"The power of Congress to waive such an adjudication of course is clear." (Citing *Nach* and numerous other cases).

Still other cases, where the jurisdiction of the Court of Claims was discussed at length, are:

The case of *Pocono Pines Hotels Company v. United States* (69 C. Cls. 91; 73 C. Cls. 447; 76 C. Cls. 334).

In the original case (69 C. Cls. 91) the Pocono Pines Company sued and obtained a judgment in the Court of Claims in the sum of \$227,239.53. Thereafter, in due course, the judgment went to Congress for appropriation but instead of appropriating for payment of same Congress enacted what it styled "a Congressional Reference" whereby the case of Pocono Pines Hotels Company "is remanded to the United States Court of Claims with complete authority, the statute of limitations or rule of procedure to the contrary notwithstanding, to hear testimony as to the actual facts involved in the litigation and with instructions

to report its findings of facts to Congress at the earliest practicable moment."

The court (73 C. Cls. 447) after reviewing the history of the case, and indeed the history of the Court of Claims and of the cases affecting the Court of Claims' jurisdiction, concluded (p. 500):

"There was no manifestation of an intent to do the plaintiff an injury, no investigation instigated as to the legality of the court's judgment, no command issued to the court to reverse its conception of the legal principles adjudicated by it, but, on the contrary, as we gather from the reports of the committee and the debates in Congress (citing Congressional Record) the act intended to obtain for Congress certain facts upon which it may determine its legislative course, legislation which Congress deemed essential in view of representations made that it did not have available for consideration sufficient facts necessary for legislative action."

Thereupon in pursuance of the mandate of Congress and in compliance with "a familiar rule of law that courts will avoid in cases of doubt a decision holding a law of Congress unconstitutional" (p. 501), the court proceeded to take further testimony. One of the judges, Judge Green, and the present Chief Justice, then Judge Whaley, dissented.

Thereafter the court made findings (76 C. Cls. 334) reiterating its findings previously made and affirmed the judgment previously rendered. Eventually the amount of the judgment was paid in due course without further question. Neither party went or attempted to go to the Supreme Court for a review of the matter.

Petitioner has gone to some length in thus citing and quoting from a long line of decisions, starting almost from the creation of the Court of Claims and extending down to quite recently, in which Special Acts very similar to, if not broader than, the one here involved have been considered and acted upon by the Court of Claims without question.

as to their constitutionality. From such decisions in a number of instances appeals were taken to the Supreme Court and acted upon without question by the higher court as to the constitutionality of the acts involved. It is not understood by the present petitioner why question should *now* be raised as to the validity of the presently questioned Special Act, or as to why the Supreme Court may not, if called upon to do so, review any decision that the lower court might make under said Special Act. Certainly there would seem to be no authority in the decided cases for the question now being raised. The Special Act here questioned was enacted in the light of all that had gone before. On that basis Congress could only suppose that the present act was a proper exercise of the legislative, and no infringement upon the judicial, function.

#### *Has Congress Usurped Judicial Prerogatives?*

It may be that the question suggested by the Court for argument is induced by the complaint of the lower court that Congress *has itself exercised*, or by the Special Act *attempted to exercise*, whatever there is of *judicial function* pertaining to the instant case. And as all judicial power, under Article III is vested in the courts, *not* in Congress, it would follow, if this were true, that the Special Act goes beyond what the Congress may constitutionally do, and hence the present action may not be reviewable by this Court under Article III.

But Congress has not exercised, or attempted to exercise, a judicial function, and nothing in the Special Act is susceptible of such a construction. It may be that Congress was persuaded that petitioner has some just moral or equitable claims. The Committee reports lend support to this conclusion. But Congress did not "overrule" the Court of Claims in denying allowance of such claims, or "direct a new trial." It only *validated* certain claims and gave the petitioner a *new cause of action* thereon, with a *new jurisdiction* to the Court of Claims to hear and determine same.

on the evidence in the old case and such additional proofs as might be offered. Surely the Congress has not performed, or attempted to perform, any act that involves the exercise by it of any other than a purely legislative function. The court is merely given jurisdiction to hear a new case, to decide it, and to render such judgment as the facts warrant. What, possibly, could be wrong about this?

### *Rights of Congress.*

The Court of Claims being a creature of Congress is subject to any proper direction from Congress. *United States v. Klein*, 13 Wall. 128, *DeGrott v. United States*, 5 Wall. 419; *Williams v. United States*, 289 U. S. 552.

Congress surely has the right to create by statute an obligation against the United States even though none without such act existed. That is what was done here, nothing else.

It was not and is not for the Court of Claims to question the methods followed by Congress in arriving at the conclusion that this petitioner had or has a just cause of action. *United States v. DeMoines Navigation & Railway Co.*, 142 U. S. 510; *Calder v. Michigan, Ex rel.*, 218 U. S. 591; *James Everard's Breweries v. Day*, 265 U. S. 545.

Nor is it for the courts to give forced meaning to the words of a statute or make a strained construction of legislative enactments. *United States v. Appalachian Electric Power Company*, 23 Fed. Supp. 83, affirmed 107 Fed. (2d) 769, reversed on other grounds 311 U. S. 377.

Congress possesses the sole right to say what shall be the form of proceedings, either in equity or at law, in the Courts of the United States and in what cases an appeal shall be allowed. *City Bank of New Orleans Ex parte*, 3 How. 292; *Wadman v. Southard*, 10 Wheat. 1.

In *Simms v. Hundley*, 6 How. 1, it was held that the rules of evidence established by a State statute are to be followed by the courts of the United States when sitting in that State.

In *Connecticut Mutual Life Insurance Co. v. Schafer*, 94 U. S. 457, it was held that the rules of evidence as enacted by Congress prevail in the courts of the United States over the rules of the State in which the trial is had.

In other words, it seems to be the settled rule that the legislative branch of the Government may prescribe and direct the rules of evidence to be applied. The Court of Claims has taken exception to the alleged fact that Congress in the Special Act indicated something of a rule of evidence to be followed as to certain items of claim. It seems always to have been held that Congress may properly do just exactly this.

The courts naturally cannot enlarge or deflate their own authority. That is a legislative function (*The State of Rhode Island v. The Commonwealth of Massachusetts*, 12 Pet. 657). As said by the court in that case (p. 721):

"In obedience to the injunction of the constitution, Congress exercised their power, so far as they thought it necessary and proper, under the 17th clause of the 8th section, 1st article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the Government of the United States; 3 Wheat. 389. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; 1 Wheat. 326; 4 Wheat. 407, leaving the details to Congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power, must therefore be made by laws passed by Congress, and cannot be assumed by any other department; else, the power being concurrent in the legislative and judicial departments, a conflict between them would be probable, if not unavoidable, under a constitution of government."

And further on (p. 723) the court added:

"We must presume that Congress did not mean to exclude from our jurisdiction those controversies, the decision of which the States had confided to the judicial power, and are bound to give to the constitution and laws such a meaning as will make them harmonize, unless there is an apparent or fairly to be implied conflict between their respective provisions."

II. *The decision of the lower court that the Special Act here involved is unconstitutional, is of a nature, regardless of other circumstances, which admits of a review by this Court under Article III.*

The Court of Claims has here decided that an act of Congress is unconstitutional. It would seem scarcely open to argument that whether the court was right or wrong, i. e., whether the act is or is not constitutional, is a question that is squarely within the province of this Court to decide under Article III of the Constitution. Such indeed is one of the matters specially assigned to this Court by the provisions of the Constitution for final determination.

This proposition would seem not to require the citation of authorities. It is elemental and fundamental. The Supreme Court is the one body in our system of Government that has the right of final decision as to whether an act of Congress is or is not valid under the Constitution.

III. *Even if the Special Act were unconstitutional in part, it would still remain that the Special Act is entirely constitutional and valid in giving the Court of Claims jurisdiction to perform a specified task.*

It is not conceded—in fact it is earnestly denied—that any part of the Act is unconstitutional for any reason. As hereinbefore pointed out, the Special Act conferred judicial functions, which under the applicable laws are reviewable by this Court. That part of the Act giving the parties the right of applying for a writ of *certiorari* from any decision made by the Court of Claims is therefore valid.

The Court of Claims is a *legislative*, not a *constitutional* Court. As such it is peculiarly subject to legislative requirements.

*Ex Parte Bakerite Corporation*, 279 U. S. 438, 449, after reciting the purport of Article III of the Constitution and stating that the inferior courts created under that article are not the only courts that may be created by Congress, others being established under other provisions of the Constitution, the Court said (p. 449):

"But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior."

At pp. 452, 453, with particular reference to the Court of Claims it was said:

"Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them."

"The Court of Claims is such a court. It was

created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies."

"For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to the executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes. Other claims have since been included in the delegation and some have been excluded. But the court is still what Congress at the outset declared it should be—a court for the investigation of claims against the United States. The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress."

Further on (p. 454) it was said:

"In *Gordon v. United States*, 117 U. S. 697, and again in *In re Sanborn*, 148 U. S. 222, this Court plainly was of opinion that the Court of Claims is a legislative court specially created to consider claims for money against the United States and on that basis distinctly recognized that Congress may require it to give advisory decisions. And in *United States v. Klein*, 13 Wall. 128, 144-145, this Court described it as having all the functions of a court, but being as respects its organization and existence, *undoubtedly and completely under the control of Congress*" (italics added).

The decision of this Court in *Williams v. United States*, 289 U. S. 553-565, definitely decided that the Court of Claims

is a legislative court subject to the will of Congress.

The Court there said (p. 565):

"By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name; and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or concurrent jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution."

And again (pp. 579, 580, 581):

"Since all matters made cognizable by the Court of Claims are equally susceptible of legislative or executive determination, *Bakelite* case, *supra*, pp. 452, 458, they are, of course, matters in respect of which there is no constitutional right to a judicial remedy, *United States v. Babcock*, 250 U. S. 328, 331; and the authority to inquire into and decide them may constitutionally be conferred on a nonjudicial officer or body."

"The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, be rejected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency. Compare *Springer v. Philippine Islands*, 277 U. S. 189.

201-202. And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers. Compare *Kilbourn v. Thompson*, 103 U. S. 168, 190-191."

Congress is presumed to know the law, and is presumed therefore to know that the Supreme Court will not review the exercise by lower courts of a non-judicial function, and that any attempt to so provide would be invalid and unconstitutional. It is well established that courts will endeavor to construe a statute so as not to strike it down because it is unconstitutional (cases cited *supra*). The application of these principles must lead to the consideration that since Congress in providing in the Special Act that either party might apply for a review by the Supreme Court, it is intended, and did in fact intend, only to create new obligations of the United States, waive certain defenses and then confer jurisdiction upon the Court of Claims to adjudicate the rights of the parties upon the basis of those obligations, which it had created and the defenses to which it had waived.

But, regardless of the validity of that provision, it is submitted, that the other provisions are valid and proper and should be upheld.

### *Provisions Separable.*

An Act containing separable provisions may be constitutional as to some though void as to other.

In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 635, it was held:

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, it was said:

"The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced."

See also *Champlin Refg. Co. v. Commission*, 286 U. S. 210.

### Conclusion.

From all the cases which petitioner has been able to examine, it is his conclusion:

1. The Special Act here involved gives to the Court of Claims only a jurisdiction to hear and determine questions which are properly reviewable by this Court under Article III of the Constitution.

2. The decision of the lower court declaring an act of Congress to be void for lack of constitutionality is one that under Article III of the Constitution and otherwise is clearly reviewable by this Court.

3. The provisions of the Special Act are separable and even if one part were invalid, which is denied, other parts may properly be held to be valid. The Special Act creates a new cause of action, with a new liability. It is for the lower court to determine and decide the new case so presented.

4. The Court of Claims has itself recognized that the act did confer upon it matters for decision that call for the

exercise of judicial power and it acted under the authority so conferred by passing upon the merits of one item of claim referred by the Special Act.

5. The Special Act involved no assumption by Congress of matters within the province of the Courts, not Congress.

It is respectfully submitted that the judgment and decision of the Court of Claims should be reversed and the case remanded with direction to the court to proceed in accordance with the requirements of the Special Act.

6. The issues presented involve a case which is reviewable under Article III because (1) it is a "case" in the legal sense of Article III in that, as between adverse parties, it was brought to issue in the lower court and there judicially decided against the constitutionality of the Special Act confirmed by order of dismissal, a final judgment; because (2) the action arises under the Constitution and (3) is a controversy to which the United States is a party.

Respectfully submitted,

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*Attorneys for Petitioner.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944

No. 26

ALLEN POPE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the Court of Claims.

**SUPPLEMENTAL BRIEF FOR PETITIONER.**

(Filed by Petitioner with Consent of Counsel)

ALLEN POPE,  
*pro se.*

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**QUESTIONS PRESENTED.**

I. Whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this Court under Article III of the Constitution. On granting petition for certiorari this Court requested counsel to discuss the foregoing question in their briefs and on oral argument.

II. Whether the Special Act of February 27, 1942, 56 Stat. 1122, ch. 122, is constitutional. Question raised by the decision below, and subject of the petition.

## **JURISDICTION.**

In addition to the Act of February 13, 1925, sec. 3(b) as amended, the jurisdiction of this Court rests upon the Special Act of February 27, 1942, sec. 4; the import of the Act of August 24, 1937 (50 Stat. 751, ch. 754), secs. 2 and 5, which provides for direct appeal and precedence of hearing in this Court when a decision in a case in the Court of Claims is against the constitutionality of an Act of Congress, bears on the question of reviewability of the present action.

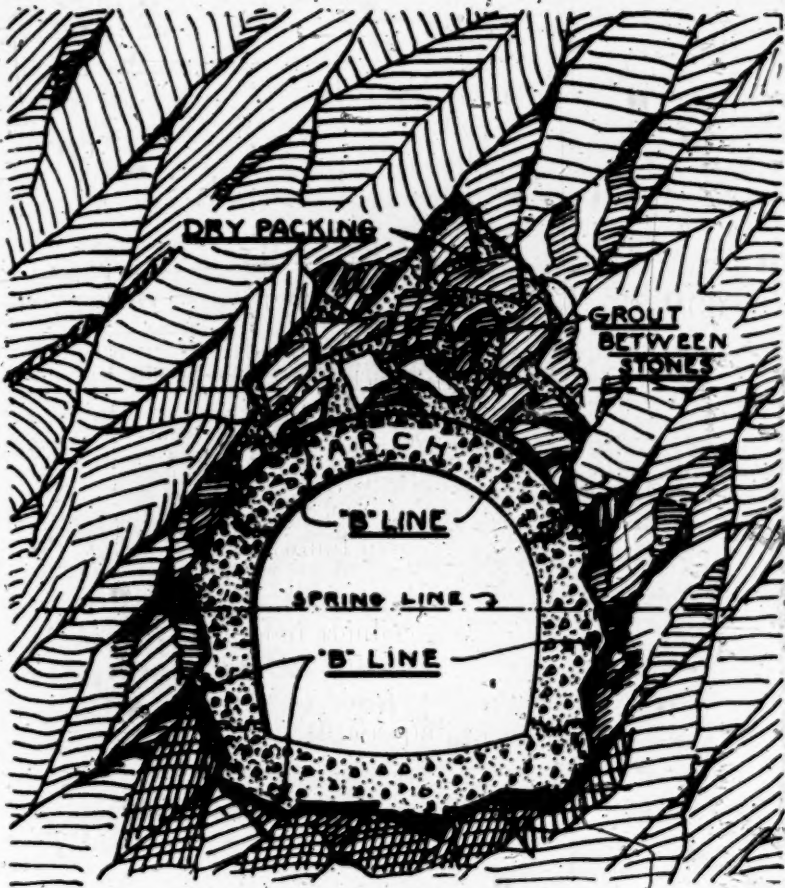
### **PURPOSE OF SUPPLEMENTAL BRIEF.**

It has been necessary for both of petitioner's counsel to be out of town, one in the mid-west the other on the west coast, as counsel's brief becomes ready for the printer. Being familiar with petitioner's knowledge of the case, and apprised of his ideas generally by telephone, counsel have consented that petitioner present a brief in supplement to their brief.

In respect of the question of reviewability, petitioner proceeds on the theory that Article III designates the features of all cases reviewable, that the present action possesses such features and therefore is reviewable. With this method of reasoning unless everything is proved, nothing is proved. Hence the apparent length of argument on this subject. The structure of the argument is simple, however, as may be observed from the Subject Index as well as from the Summary of Argument.

As to the question of constitutionality, the jugular of the case seems to lie in the meaning of section 2, particularly in the restrictive phrases which will be shown to be merely delimitations of magnitude of the amounts of the various items of claim and in no way invasion of the judicial prerogative. Petitioner's argument is therefore devoted to such aspects.





## CONSTRUCTION IN UNTIMBERED SECTIONS

THE ROOF, ROTTEN SEAMY ROCK, CAVED IN FOR ENTIRE LENGTH OF 2000 FEET. THE CONCRETE ARCH LINING WAS BUILT TO THE "B" LINE. THE SPACE OVER THE ARCH OUTSIDE OF THE "B" LINE WAS REQUIRED TO BE FILLED WITH DRY PACKING, AND, BY DIRECTION OF THE CHIEF OF ENGINEERS ON PLAINTIFF'S APPEAL, WAS REQUIRED TO BE GROUTED FULL. NO PAYMENT HAS BEEN MADE FOR ANY OF THE DRY PACKING NOR GROUT THUS REQUIRED TO BE USED.

## ADDITIONAL STATEMENT OF THE CASE.

The following supplemental facts, completely documented to the record, are given for the purpose of clarifying the meaning of section 2, which meaning petitioner considers the "jugular" of the case.

Petitioner, under contract with the United States (R. 9-47), constructed a tunnel for the water supply system in the District of Columbia (R. 24). The work was planned to be carried on mostly through solid rock with provisions made for construction through unstable formations should such be encountered (R. 38, 39). The work was agreed to be paid for on the basis of unit prices (R. 9, 10, 24); with unit prices for excavation (R. 28); for timber bracing for use in loose ground (R. 38, 39); for concrete; for drypacking, i.e., stones packed in place over the tunnel arch where cave-ins might occur (R. 43); and for grout, i.e., liquid cement mortar pumped into place between stones of the drypacking (R. 43). These were five principal items of work to be done, and are now involved in the present action on the basis of the new liabilities created in the Special Act. No solid rock was encountered. The roof of the excavation caved in from one end of the tunnel to the other (*Allen Pope v. United States*, 76 C. Cls. 64, 67, 68, Plates II and III).

Plate II of said prior decision is part of the lower court's Finding III p. 65. It clearly depicts the principal facts of the situation as found by the court and explains terms now used in Section 2 of the Special Act. Plate III *supra* p. 68 is further explanatory of construction in timbered sections but is not here reproduced.

These cave-ins involved unexpected increases in amounts of work over the Government's estimate, which work, however, was required to be done on the Government's obligation regardless of its estimate (R. 24). Upon completion of the work, the then contracting officer declined to pay on the agreed basis. This led to suit in the Court of Claims, No. K-366; decided March 7, 1932; reported in 76 C. Cls.

64; whereby award of \$45,174.46 was made covering portions of the claims, but including nothing as to the items there claimed on the then existing rights of action but now forming the substance of the present action based upon the new liabilities created.

This prior decision, *Allen Pope v. United States*, 76 C. Cls. 64, was pleaded as part of the petition in the present action (R. 2; III). It was requested to be made a part of the record sent up to this Court. The lower court sent up the original contract instead. The latter was only a part of Finding II of the prior decision by reference. The claims pleaded in the present action (R. 4, 6, 7, 8) are founded on the basis of the quantities given in Findings III, IV, V, VI, IX, X and XI. The liquid method of measurement described by the court is set out *supra* 85.

There has been appended to the official printed report of the instant case, *Allen Pope v. United States*, 100 C. Cls. 375, 390-393, a report of the "History Of The Issue." The pages 391-393 are statements of facts in the present action. The lower court, however, did not make them as findings and did not send them up as part of the record (R. 1-16). In large part they are the references just made above to the prior case, and are the parts of that case pertinent to the instant case. This history pages 391-393 indicates that a commissioner's report was made and submitted. The record in the instant case is silent on this feature. Compare verbatim this recited history with the commissioner's report printed in the Appendix hereto.

### **SPECIFICATIONS OF ERRORS.**

The Court of Claims erred:

1. In holding that the Special Act was an unauthorized legislative direction as to the basis for deciding the claim involved.
2. In holding in effect that the Special Act was unconstitutional and void, as an unauthorized direction by the Congress of a judicial function.
3. In failing to render a judgment on the claims.

## SUMMARY OF THIS ARGUMENT.

There are now two questions:

I. *Reviewability*, under Article III of the Constitution, of the present action, authorized by the Special Act (56 Stat. 1122; ch. 122).

II. *Constitutionality* of the Special Act.

The first question is that requested to be discussed by this Court upon granting petition for certiorari. The second is that raised by the decision of the lower court, and is the subject of the petition. Both are constitutional questions.

### **I. As to the Reviewability of the Present Action, Authorized by the Special Act, Under Article III of the Constitution.**

Article III establishes the conditions and defines the types of cases reviewable. The first prescription is that the action be a "case" in the sense of Article III, and the other is that review shall be within the currently applicable exceptions and regulations made by Congress. The appellate power extends to all cases arising under the Constitution, the laws of the United States, and to controversies to which the United States is a party. This Court has defined these provisions in numerous decisions. Whence it is to be shown that the present action is such a case, and, thereupon, to set out the applicable exceptions and regulations of Congress.

The present action is a "case" in the sense of Article III in that, as between adverse parties, it was properly brought to issue in the lower court, and there judicially decided against the constitutionality of the Special Act, which judgment was confirmed by order of dismissal, a final judgment, concluding the rights of the parties. The present action is a case authorized by Special Act believed constitutionally conferring jurisdiction upon a legislative court

and constitutionally requiring a judicial determination of the claims mentioned, not ministerial trivia as the lower court complained. Though the lower court declined to make the judicial determination on the claims required by the Act, its judgment that the Act was unconstitutional was a judicial determination, and, as confirmed by its order of dismissal on such account, is believed to satisfy this requirement for a "case" under Article III.

The cause depends upon the validity of a law of the United States upon which petitioner has asserted his rights. It is, therefore, a case arising under the Constitution. Its correct decision depends upon the construction of both the Constitution and the Special Law of the United States. Therefore, it arises under the Constitution and law of the United States.

The United States may not be sued without its consent. It has given consent by the Special Act. Suit was filed. The United States, in addition to other acts of defense, filed general traverse denying each and every allegation. The United States thus became party defendant. Whence, the present action is a "controversy to which the United States is a party."

The currently effective exceptions and regulations of Congress are (1) the Act of February 13, 1925, as amended, sec. 3(b), which authorizes review from the Court of Claims on certiorari; (2) the Special Act, which, in sec. 4, provides for application for certiorari as in other cases; and (3) the Act of August 24, 1937, 50 Stat. 751, ch. 754, secs. 2 and 5, which provides for direct appeal and for precedence of hearing in this Court when any decision in the Court of Claims is against the constitutionality of any law of Congress. While the rights of the parties are no doubt forfeit thereunder because of the thirty day clause, the spirit of the Act adberes, if not to the right of review, at least to the importance of review. 6

## II. As to the Constitutionality of the Special Act.

The substance of the argument offered under this question is a showing of the meaning of the Act; that the provisions thereof, in accordance with such meanings, are within the constitutional powers of Congress to enact; that they are proper legislative directions to the Court of Claims; and do not in any respect invade the rights of the judicial branch of the government; that the only restrictions of any kind pertain solely to magnitude; i.e., as to the number of items of claim that may be sued for, and the quantities of work in such items; that nothing prevents the court from finding according to its own methods whether the work was done, whether it was paid for, and whether the government received the use and benefit; that the Act provides a new cause of action; that the action based thereon is a new case; that the Act may be fairly so interpreted, thus avoiding need for a ruling on its constitutionality otherwise; that thereupon the decision below should be reversed with instructions to proceed in accordance with the provisions of the Act.

## ARGUMENT.

- I. "Whether the Present Action, Authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a Nature to Admit of Review by This Court Under Article III of the Constitution."

When granting petition for certiorari this Court requested counsel to discuss the above question in their briefs and on oral argument. Expressed in other words, the words of Article III, the question appears to be ~~whether~~ (and answer is to be shown that):

The present action (1) is a "case" in the sense of Article III; (2) is a case "in law," (3) "arising under this Constitution, the laws of the United States," (4) is a "controversy to which the United States shall be (is) a party," (5) is not such other type case named as to which "the Su-

preme Court shall have original jurisdiction"; nor (6) any other type named in Article III as to which the Court has appellate jurisdiction; and, consequently, is such a case as to which "the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make."

Counsel has discussed principally one aspect of the conditions required for a "case" in the sense of Article III, i.e., that a judicial determination was required to be made by the lower court under the authority of the Special Act, not a mere ministerial operation, and that therefore a decision based thereon is reviewable. It seems to petitioner that other conditions are exacted by Article III in order to reach the appellate power of this Court; and that, on the other hand, very important rights are granted by Article III which open the door to review. Petitioner discusses such features as follows:

These provisions of Article III are first defined on authority of this Court's decisions. Thereafter in each instance there are set out the corresponding features in the present action which show conformance to such requirements.

(1) *"In all cases"*: As to the natures of all "cases" subject to the appellate power of the United States as vested in the Supreme Court, this Court has determined that there must be three essentials to such cases: (a) the action must be in certain prescribed form, (b) between adverse parties, and (c) must be a judicial determination, the final and indisputable basis of action by the parties. The first two are almost obvious. The latter requires some discussion. Discussion of each is here set out so that all may be quickly glanced.

(a) *Prescribed form; the principle defined*: The judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case . . ." This principle is supported by the following citations in "Con-

stitution of the United States of America (Annotated)" Senate Document No. 232, 74th Congress, 2nd Session, p. 450. *Osborn v. Bank of United States*, 9 Wheat. 738, 819; *Smith v. Adams*, 130 U. S. 167, 173; *Muskrat v. United States*, 219 U. S. 346, 356-358; *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 456.

(a) *Prescribed form; in the present action:* Petitioner has submitted his claims to the judicial power capable of acting upon them, the Court of Claims, which is the power named in the Special Act, and the only power thereunder which may have original jurisdiction. Petitioner has asserted his rights in the form prescribed by law. These conditions are met by the pleadings (R. 1-9). According to this Court's definition, petitioner's claims have become a "case" in these requisites:

(b) *Adverse litigants; the principle defined:* The litigants in a case subject to the judicial power must be truly adverse parties, *Muskrat v. United States*, 219 U. S. 346, 359-361; especially is this true when the court assumes the grave responsibility of passing upon the constitutional validity of legislative action, *United States v. Johnson*, 319 U. S. 302, 304, 305.

(b) *Adverse litigants; in the present action:* The parties are adverse. For seventeen years petitioner has sought in strenuously contested efforts to obtain payment for this work: first, with successive authorities in the War Department; then with the Comptroller General; then lengthy litigation in the Court of Claims involving five motions for new trial; then much opposed effort to obtain legislation in Congress culminating, however, in the present Special Act, restricted to four particular items of the fifteen originally claimed, and now provided to be adjudicated on the basis of the therein newly created liabilities, i.e., that the work had been done, that it had not been paid for, and that the Government had received the use and benefit. These rights of action, created by the Special Act,

petitioner asserted in his pleadings below (R. 1-9). These pleadings respondent has denied by its general traverse (R. 47). Whence, that the parties are adverse may hardly be gainsaid. For this history of the issue, see counsel's brief, "Statement", and (R. 47, 48), also *Allen Pope v. United States*, 76 C. Cls. 64; and 100 C. Cls., 375, 390.

(c) *Judicial determination; the principle defined:* The judicial power exercised in a case must not be moot nor merely ministerial, ancillary or advisory, but a judicial determination, the final and indisputable basis of action by the parties, enforceable by an order of execution issuing from the court.

Since the lower court complains (R. 49, 50, bottom each page) that the Special Act gives it but minor duties to perform, and questions their judicial nature, and declined to perform them; but did, nevertheless, exercise judicial determination in its primary essence by adjudging the Special Act unconstitutional, and enforced such judicial determination by an order of dismissal, it appears well to quote pertinent decisions of this Court in some detail.

What the lower court judicially decided and what it ordered are the final factors that make the present action reviewable.

This Court's decisions on the point follow:

*United States v. Ferreira*, 13 How. 40.

Mr. Chief Justice Taney: (1851)

p. 47. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons

to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award, and an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

\* \* \* \* \*

p. 48. The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

Mr. Justice Harlan: (1899)

See pages 455-457. (the Court referring to *Gordon v. United States*, 2 Wall. 561, printed 117 U. S. 697).

p. 457. "The award of execution," Chief Justice Taney said, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term without it. \* \* \*

In a more recent case this court dismissed an appeal from a final order made in the Court of Claims in virtue of a particular statute observing: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress." *In re Sanborn*; 148 U. S. 222, 226; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 483.

"Under the principle established in the cases above cited, the objections urged against the jurisdiction of the Court of Claims and of this court cannot be maintained, if the present proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by the Court of Claims and by this court is not simply ancillary or advisory but is the final and indisputable basis of action by the parties."

*Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

Mr. Chief Justice Taft: (1922)

p. 444. Such legislative or administrative jurisdiction, it is well settled cannot be conferred on this Court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the Court in *Maskrat v. United States*, 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this Court and of inferior courts of the United States ordained and established by Con-

gress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this Court without real parties or a real case, or to administrative or legislative issues or controversies. *Hayburn's Case*, 2 Dall. 410, note; *United States v. Ferreira*, 13 How. 40, 52; *Ex parte Siebold*, 100 U. S. 371, 398; *Gordon v. United States*, 117 U. S. 697; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216.

*Ex Parte Bakelite Corporation*, 279 U. S. 438.

Mr. Justice Van Devanter: (1928)

p. 450. A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that Article. (*Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 442-444; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, 700.)

*Williams v. United States*, 289 U. S. 553.

Mr. Justice Sutherland: (1932)

p. 564. The decision of the *Gordon* case in the 2nd of Wallace was announced on March 10, 1865. At the next session of Congress § 14 was repealed. Ch. 19, 14 Stat. 9. Since that time it never has been doubted that Congress may authorize an appeal to this court from a final judgment or decree of the Court of Claims. *United States v. Jones*, 119 U. S. 477, 478-479; *In re*

*Sanborn*, 148 U. S. 222, 225; *Luckenback S. S. Co. v. United States*, 272 U. S. 553, 536 *et seq.*, or that the judgment of this court rendered on such appeal constitutes a final determination of the matter. *United States v. O'Grady*, 22 Wall. 641, 647. It is equally certain that the judgments of the Court of Claims, where no appeal is taken, under existing laws are absolutely final and conclusive of the rights of the parties unless a new trial be granted by that court as provided by law. *Id.* Indeed as appears from the cases already cited and others, such finality and conclusiveness must be assumed as a necessary prerequisite to the exercise of appellate jurisdiction by this court.

Counsel quotes *Aetha Life Insurance Co. v. Haworth*, 300 U. S. 227, to a related purpose see counsel's brief. This case cites many authorities.

In addition to these definitions of judicial determination, it is observed that where there is question of the constitutionality of an Act in a particular case, it is the province and duty of the judicial branch to say what the law is. Is this not in itself the essence of judicial function? See *Coleman v. Virginia*, 6 Wheat. 264, 404, quoted in context post. The following bears on the point:

*Marbury v. Madison*, 1 Branch 137.

Mr. Chief Justice Marshall:

p. 137. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law; the court must determine which of these conflicting

rules governs the case. This is of the very essence of judicial duty.

(c) *Judicial determination as it appears in the present action:*

The present action, as authorized by the Special Act, is not only one wherein the court of original jurisdiction is authorized by the Act to make a judicial determination, but apparently is required to do so in the sense of Article III. The Act commencing with the first section reads:

"Be it enacted \* \* \* \* that jurisdiction be, and the same is hereby, conferred upon the Court of Claims \* \* \* \* to hear, determine, and render judgment \* \* \*"

This would seem to mean that the Court of Claims shall take evidence, weigh it, determine the facts therefrom, adjudicate them against the law, and enter an executory order of judgment finally disposing of the issue. All of these operations are judicial functions in the true sense of Article III. A decision made under authority of the Act is not to be moot, ministerial, ancillary, nor advisory. It is not to be submitted as an intermediate step to a final determination by, nor to be for the use of, any department, officer, or committee of Congress. Neither is it a delegation of authority as to a commissioner, appointed under a treaty, vested with authority to make a conclusive award. The jurisdiction conferred by the Act is to a court of law, a court of record, a legislative court of the United States, authorized by other laws to render final and binding decision and so recognized by this Court for years. *Williams v. United States*, 289 U. S. 553, 564, *supra*.

Section 4 of the Act, authorizing application for certiorari, confirms this intent of Congress that a judicial determination in the true sense of Article III be rendered. As counsel has indicated, Congress is presumed to know the law and to know that none other than a true judicial determination could be reviewed. Whence the intent to

procure a real judicial determination in the sense of Article III is clear.

That such a determination is required and authorized by the Special Act unhampered by restrictions either as to so-called ministerial directions or invasion of judicial prerogative is seen from the plain provisions with respect to the item of excavation of caved-in materials, as follows (R. 1):

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed, for which he has not been paid, but of which the Government has received the use and benefit; namely; \* \* \* for the work of excavating materials which caved in over the tunnel arch. \* \* \*

Sec. 3. \* \* \* and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims together with any additional evidence which may be taken.

If reference is now made to Plate II reproduced hereinbefore, the work involved is the excavation of the material which caved in over the tunnel arch. Nothing is said in these provisions as to how the Court shall measure or compute nor is any limit fixed except that the materials shall have caved in from over the arch. The Court is free by its regular methods to ascertain the three criteria fixed in Section 2 that the work had been done, had not been paid for, and that the Government had received the use and benefit. The Court is entirely free to use all the evidence available. Nothing specifies what effect the evidence shall have. This pertains to the largest item of the claim. It is, therefore, one of the principal "ingredients" of the action based on this law of the United States and the action is therefore reviewable because of this feature alone.

The lower court dismissed this action because of the alleged unconstitutionality of the Act. This in itself was a judicial determination in its primary essence, i.e., in deciding what the law of the case is. Because of this judgment the Court of Claims dismissed the petition and enforced its judgment by executory order. This was final judgment. It concluded the rights of the parties.

(2) *Case in law and equity; the principle defined:* This Court has often ruled that a case at common law is to be understood as one in which legal rights are to be ascertained as contrasted with one where equitable rights alone are recognized and equitable remedies administered. In support of this principle, the following citations are given on p. 452 of "Constitution of the United States of America" *supra*. *Irvine v. Marshall*, 20 How. 558; 565; *Persons v. Bedford*, 3 Pet. 433, 447; *Robinson v. Campbell*, 3 Wheat. 212, 222; *Fenn v. Holme*, 21 How. 481, 484; *Sheirburn v. DeCordova*, 24 How. 423; *Strother v. Lucas*, 6 Pet. 763, 768, 769; *Parish v. Ellis*, 16 Pet. 451, 453, 454. For further definition of principles of equity applied in English Courts, before 1789 and developed in Federal Courts see *Gordon v. Washington*, 295 U. S. 30, 36; *Waterman v. Canal-Louisiana Bank and T. Co.*, 215 U. S. 33, 43. This subject of "cases in law and equity" is also discussed in the next succeeding section (3) covering "cases arising under the constitution," etc., note especially *Cohens v. Virginia*, 6 Wheat. 264, 405 as quoted post p. 19.

(2) *A Case in law; in the present action:* The present action is a case where legal rights as the cause of action and jurisdiction are to be ascertained under terms of a Special Law and under other applicable laws. The Act does not specify any equitable rights for adjudication. The point here made under the heading of this paragraph is that the present action is a case "in law" within the meaning of Article III.

(3) *Cases arising under this Constitution and the laws of the United States; the principle defined:* Definition of

what these constitutional terms mean is best observed from this Court's decisions as follows :

*Cohens v. Virginia*, 6 Wheat: 264.

Mr. Chief Justice Marshall: (1821)

p. 378. The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exceptions whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

p. 379. If it be to maintain that a case arising under the Constitution, or a law, must be one in which a party comes into Court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may be truly said to arise under the constitution or a law of the United States, wherever its correct decision depends on the construction of either. Congress seems to have given its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

p. 392. And we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it

appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected.

p. 404. It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant and we cannot insert one.

p. 405. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. \* \* \*

p. 416. We are not restrained, then, by the political relations between the general and State governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever Court they may be decided. In expounding them, we may be permitted to take into view those considerations to which Courts have always allowed great weight in the exposition of laws.

*Tennessee v. Davis*, 100 U. S. 257.

Mr. Justice Strong: (1879)

p. 264. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. (*Cohens v. Virginia*, 6 Wheat. 264) It is not merely where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party, as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim of protection, or defence of the party, in whole or in part by whom they are asserted. Story on the Constitution, sect. 1647; 6 Wheat. 379: It was said in *Osborne v. The Bank of the United States* (9 Wheat. 738). "When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause although other questions of fact or of law may be involved in it." And a case arises under the laws of the United States when it arises out of the implication of the law.

*Western Union Telegraph Co. v. Ann Arbor Railroad Co.*, 178 U. S. 239. Mr. Chief Justice Fuller: (1899)

p. 243. "When a suit does not really and substantially involve a dispute or controversy as to the effect or con-

struction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal or logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Gold Washing and Water Co. v. Keyes*, 96 U. S. 199; *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571."

The above cited with approbation in *Gableman v. Peoria Etc. Ry. Co.*, 179 U. S. 335, 339.

(3) *A case arising under this Constitution, the laws of the United States as shown in the present action:*

The correct decision of this case depends upon the construction of both the Constitution and a law of Congress, the Special Act (See *Cohens v. Virginia*, *supra*). It grew out of legislation of Congress (See *Tennessee v. Davis*, *supra*).

The court below plainly says (R. 49, 50):

"The history recited above presents a problem as to the power of Congress, under the Constitution, to do what the special act attempts to do."

"Thus a second serious question as to the Constitutional power of Congress is presented.

"The government urges that we avoid the constitutional issue by construing the act to mean only that a new trial is granted to the plaintiff by the act, in which new trial the court will be free to decide, in the usual manner of a court, the questions of law and fact involved in the case."

"While we recognize that a court should make every proper effort to give a statute a construction which keeps it clear of serious constitutional questions, we are unable to so construe the special act. \* \* \* We therefore undertake the question as to whether Congress

can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce."

The point of argument discussed under this heading is as to whether the correct decision of the case turns on the construction of either the Constitution or a law of Congress. From the foregoing quotations of the decision below and its conclusion, i.e.,

"It follows from what we have said that the plaintiff's petition must be dismissed. It is so ordered." (R. 59.)

it is clear that the correct decision depends upon the construction of both the Constitution and a law of Congress.

(4) *Controversies to which the United States shall be a party; the principle defined:* This means either party plaintiff or party defendant. Since the United States in the present action is party defendant, it is only necessary to discuss such aspect. "No principle is better established than that the United States may not be sued in the courts of this country without its consent." *State of Louisiana v. McAdoo*, 234 U. S. 627, 628, and cases there cited; *United States v. Clarke*, 8 Peters 436; *United States v. Lee*, 106 U. S. 196; *Kansas v. United States*, 204 U. S. 331, 333.

(4) *The present action is a controversy to which the United States is a party:* The United States has given its consent to be sued by virtue of the Special Act of Congress signed by the President (R. 1). Therefore, the United States may be sued in accordance with the consent thus granted. In accordance with such consent, the petitioner sued the United States in the Court of Claims filing his petition July 7, 1942 (R. 1). On August 15, 1942, the United States filed its General Traverse denying each and every allegation made by petitioner (R. 47). Whereupon, or on

December 8, 1943, the case, on the basis of a commissioner's report (*Allen Pope v. United States*, 100 C. Cls. 375, 391) printed briefs and oral argument by the parties, Mr. Assistant Attorney General Francis M. Shea for the defendant, the case was submitted on merits (R. 47). Thus the United States has become properly, and is, party defendant to the controversy.

(5) *In other classes of cases or controversies named; the principle defined:* This clause covers other remaining classes of cases named in Article III. They are those arising from treaties; all cases of admiralty and maritime jurisdiction; controversies between citizens of different States; between citizens of the same State claiming lands under grants of different States; between the citizens of a State and foreign States, citizens or subjects.

(5) *The present action is not of any of such other classes of cases named in Article III as are subject to the appellate jurisdiction of this Court:* This is sufficiently answered above, where it is shown from inspection of Article III that the present action is not such another case.

(6) *And in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction; the principle:* Further definitions need not be sought.

(6) *Nor is the present action a case affecting ambassadors, other public ministers and consuls, nor one in which a State is a party as to which the Supreme Court shall have original jurisdiction:* The present action is a claim solely against the United States. Answer is patent from the very words of Article III and of the Special Act.

*Proofs of reviewability summarized:* Compressed into a single paragraph, the substance of the proofs of the conformance of the present action to the requirements of Article III for a reviewable case and believed shown are thus: The present action, by its pleadings, presented to the proper judicial authority, the Court of Claims, a court of

record and a court of the United States, for adjudication, complies with prescribed legal form. The parties litigant are adverse in their interests in the cause. The case was heard in the Court of Claims in the usual manner on the basis of evidence offered by the parties, report of findings of fact by a commissioner, briefs and argument by counsel. The court, pursuant to customary practice of the judicial function in every court of law, considered first the law in the case, the jurisdictional Special Act. It decided the Act to be unconstitutional. This was exercise of judicial function in its primary essence. Thereupon, or on the basis of such conclusion of law, the Court of Claims, without including any findings of fact (in such respect contrary to this Court's Rule 41, and sec. 3 (b) of the Act of February 13, 1925, amended), dismissed the petition and entered executory order to such effect. This was final judgment. It leaves the parties without recourse. The action, as it stands, further conforms to the provisions for review as prescribed by Article III in that it is a case in law, arising under and requiring construction of the Constitution and laws of the United States for its correct decision; the United States is party defendant; the case is not one as to which the Supreme Court has original jurisdiction.

*Conclusion:* Under Article III, the Supreme Court has appellate jurisdiction, both as to law and fact, in the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), with such exceptions and under such regulations as the Congress has made.

*Exceptions and Regulations of Congress:* The final point to be established in order to show the delimitations of power of review of this Court in the present action, is to set out the exceptions and regulations which Congress has made, which are currently effective and applicable in the present action. They are:

- (1) The Special Act, approved February 27, 1942, 56 Stat. 1122, ch. 122; sec. 4 thereof, provides for application for writ of certiorari as provided by law in other cases (R. 2):

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Since the petition for certiorari has already been granted by this Court, section 4 has this present significance: It supports argument that the present action was intended by Congress under the Special Act to be the kind of a "case" with respect to subject matter and finality of decision of the Court of Claims as would require a "judicial determination" in the sense of Article III, for Congress knew that no other than such a case would be reviewable.

(2) The Act of February 13, 1925, as amended by the Act of May 22, 1939, Sec. 3 (b), 53 Stat. part 2, 752, ch. 140, the same being the basis of this Court's Rule 41, the Act itself being published in the "Appendix To Rules", pp. 1-10, of the current issue of the "Revised Rules of the Supreme Court of the United States."

This section 3 (b) of this Act stands virtually as the currently effective "exceptions and regulations of Congress" applicable to the present action. It provides for review on certiorari.

However, under the extraordinary circumstances where the Court of Claims might rule against the constitutionality of an Act of Congress, as has been done in the present action, the first time that the Court of Claims has so ruled in its entire history of eighty-nine years, there has been enacted the following statute:

(3) The Act of August 24, 1937, 50 Stat. 751, ch. 754, Sections 2 and 5 thereof, the same being the basis of this Court's Rule 47, the Act itself being published in the "Appendix to Rules", pp. 11-13 of the current issue of the "Revised Rules of the Supreme Court of the United States."

This Act provides for direct appeal and precedence of hearing in this Court in the event of a decision in the Court of Claims against the constitutionality of an Act of Congress. The Court of Claims has taken no notice of the Act in its rules as the Act requires. Neither do the Rules of any other Federal Court notice Section 2 of this Act, except those of this Court, so far as petitioner discovers. Neither party availed itself of the 1937 Act within the prescribed thirty day period.

The important point to notice with respect to this Act is that even though the rights of action of the parties thereunder may be, or are, forfeit, the spirit of the Act remains, illustrating the seriousness attached by Congress and the President to a challenge by the judiciary of the constitutionality of any legislative act.

*Conclusion as to Question I, the reviewability, under Article III of the Constitution, of the present action authorized by Congress:* The present action, in its legislative authorization, in what has been done thereunder by the parties, and by the court below, the prescribed court of original jurisdiction, the Court of Claims, conforms in all respects to the requirements of Article III of the Constitution for review by this Court. Whence, this Court should review the case on certiorari in accordance with the Act of February 13, 1925, sec. 3(b) as amended, as petitioned, and should consider the matter of constitutionality of the Special Act as questioned by the court below.

## II. CONSTITUTIONALITY OF THE SPECIAL ACT.

(56 Stat. 1122, ch. 122)

This supplemental discussion of the question of constitutionality of the Special Act relates to Section 2, to the provisions thereof describing the four items of work permitted to be sued for, and especially to the phrases which are seemingly restrictive upon the court, but which, in net effect, are but limitations of magnitude, and are not impositions upon the judicial function. In order to show how this

is so these provisions are here examined with respect to each of the four items of claim permitted to be considered.

The words of the Act are plain, and, it is believed, may be clearly understood as they stand. It would seem that the obvious purpose of the Act would resolve any doubts; and that no data other than those referred to in the Act, i.e., certain parts of the prior decision (*Allen Pope v. United States*, 76 C. Cls. 64) need be referred to as aids in construction.

The general conditions, i.e., the new criteria established, applying to all four items are to be borne in mind in the consideration of each. It will be observed that the restrictive phrases apply only to the first of such conditions, i.e., to the amounts of work performed.

Item (1). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely,

for excavation and concrete work *found by the court* to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or pay line three inches, and as to omit the timber lagging from the side walls of the tunnel; \* \* \* (R. 3)

All of this is by way of descriptive nomenclature, but the italicized phrase "*found by the court*" is restrictive. The court previously found these quantities exactly (R. 2, 4); *Allen Pope v. United States*, 76 C. Cls. 64, 75; *Allen Pope v. United States*, 100 C. Cls. 375, 391. The court is now directed to use them as basis for the new determination. The lower court seemingly objects in this instance to accepting as basis for its new judgment quantities which it had previously found, the same being but a minor duty (R. 49, bottom of page). The court overlooks, however, the purpose of Congress. Congress wants it ascertained whether any

of that work had been paid for and whether the Government had received the use and benefit. For such it authorizes judgment be rendered. These are the judicial functions authorized for this item. If any of such work is thus found not to have been paid for and it is also found that the Government has had the use and benefit, then judgment is to be rendered for such. Nothing is prescribed to interfere with the judicial function.

Item (2). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, \* \* \*

for the work of excavating materials which caved in over the tunnel arch; \* \* \* (R. 3)

This clause is entirely descriptive of what may be claimed for. There is not a word as to what the quantity shall be, except that it be that which caved in from over the tunnel arch. See Plate II opposite page 3 hereof. There is no direction as to any process the court shall use in determining the quantity of this work. Obviously this is left entirely to the court to be determined from the evidence. Nothing prescribes what effect any of the evidence shall have. As to this item the court is to determine all three of the general criteria, how much excavation was thus performed, whether any of it was paid for and whether the Government had the use and benefit.

Item (3). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, \* \* \*

for filling such caved in spaces with drypacking \* \* \* as directed by the contracting officer, the amount of the drypacking to be determined by the liquid method as

*described by the court and based upon the volume of grout actually used; . . . . (R. 3, 6)*

The last clause as italicized is restrictive upon the quantity to be determined by the court but not upon the court's discretion in determining the quantity from the evidence, nor upon any other feature of judicial function. What the Act imposes is merely the use of what Congress knew from the prior decision to be an available method of measurement, with which it was satisfied, knowing from such prior decision the maximum amount of drypacking that computation by this method would produce. The liquid method described by the court is fully set out in the prior decision, page 85. In substance it is that if any space is filled with a known volume of liquid such known volume is the volume of the space filled. Congress did not specify the result. It merely authorized the Court of Claims in using the liquid method to base its computation upon the "volume" of "grout actually used." These are two unknowns to be ascertained judicially by the court, i.e., the grout which was actually used and, secondly, the volume of such grout. These facts the court is likewise to determine by its usual rules from the evidence in the case. Having thus determined the quantity, the court will then ascertain the two other ultimate facts as to how much of such work remains unpaid for and whether or not the Government received the use and benefit.

Item (4). The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, . . . .

for filling such caved-in spaces with . . . . grout, as directed by the contracting officer, . . . . *the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the drypacking. (R. 3)*

This final italicized clause is limitation positively fixed. This means, as under Item (1), that such amount is to be the basis of the court's new adjudication by which it shall determine how much of such work has not been paid for whether or not the Government received the benefit.

The foregoing is a plain statement of the meaning of the Act. It is the meaning which petitioner has pleaded (R. 3-8). He believes it fairly within the meaning of the statute, both in its words and in its general tenor. Reference is made to the rules adopted by this Court for its own governance, as stated by Mr. Justice Brandeis in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 346, 348, note 7:

7. When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. *Crowell v. Benson*, 285 U. S. 22, 62.

As to conformance to constitutional principles and the power of Congress, the following cases apply:

*United States v. Butler*, 297 U. S. 1.

p. 62. There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that this court assumes a power to overrule or control the action of the peoples' representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty,—to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All this court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the

provisions of the Constitution; and having done that its duty ends.

*United States v. Realty Co.*, 163 U. S. 427.

p. 440. Under the provisions of the Constitution (article I, section 8) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based on considerations of a moral or merely honorary nature, such as are binding on the conscience or honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The

acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See also among other cases in this court, *Emerson v. Hall*, 13 Pet. 409; *United States v. Price*, 116 U. S. 43; *Williams v. Heard*, 140 U. S. 529.

*Ex Parte Bakelite Corp.*, 279 U. S. 438.

p. 451. Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

p. 452. Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands, or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring suits to be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies.

For sixty-five years following the adoption of the Constitution Congress made it a practice not only to determine various claims itself but also to commit the determination of many to executive departments. In time, as claims multiplied, that practice subjected Congress and those departments to a heavy burden. To

lessen that burden Congress created the Court of Claims and delegated to it the examination and determination of all claims within stated classes. Other claims ~~have since been~~ included in the delegation and some have been excluded. But the court is still what Congress at the outset declared it should be — "a court for the investigation of claims against the United States." The matters made cognizable therein include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.

Upon the foregoing, supplementing the brief of counsel, it is believed shown that the requirements for constitutionality are met, that the errors of the court below are demonstrated as assigned.

ALLEN POPE,

*Pro se.*

**APPENDIX.**  
IN THE  
**Court of Claims of the United States**

No. 45704.

(Filed Mar 3 1943)

ALLEN POPE

v.

THE UNITED STATES.

REPORT OF COMMISSIONER.

To the honorable the Chief Justice and Associate Judges  
of the Court of Claims of the United States:

Pursuant to the order of reference in the above-entitled case, the undersigned Commissioner makes the following report of his findings of fact:

1. The plaintiff is the identical Allen Pope, plaintiff in cause docketed as No. K-366, decided in this Court March 7, 1932 and reported 76 C. Cls. 64. The special findings of fact made therein by the Court are made a part of these findings by reference.

The plaintiff in case No. K-366 sued on a contract entered into December 2, 1924, for the construction of a tunnel designed to carry water for the District of Columbia. In that suit the plaintiff was given judgment for \$45,174.46. This judgment consisted (1) of an item of \$13,290.22, representing the expense of substitution ordered by the contracting officer in method but not authorized by the contract; (2) of an item of \$2,500 for timber used by the contractor and authorized by the contract; (3) of an item of \$231.54 for concrete actually placed and authorized by the contract to be placed; (4) of an item of \$500 earned, withheld and wrongfully retained for indemnification; (5) of items

aggregating \$17,427.70 for excess work due to defendant's erroneous lines and grades, including 723 cubic yards of material caved-in over the arch in the rock sections of the tunnel, and hereinafter to be referred to; (6) and of an item of \$11,225, damages for delay due to interference.

2. Section V (1) of the petition in the instant case claims (a) \$969, excavation of caved-in material, 57 cubic yards at \$17 between an original contract line, known as the "B" line, and the "B" line as lowered three inches by the contracting officer; (b) \$4,879, for excavation of 287 cubic yards of cave-ins at \$17, due to omission of side-wall lagging; and (c) \$4,879, for filling the 287 cubic yards of caved-in spaces at \$17, a total of \$10,727. This claim of \$10,727 was made in Section XII of plaintiff's petition in case No. K-366. The Court's finding made relative thereto is No. XI. Recovery was denied.

Section V (2) of the petition in the instant case claims \$81,277 for excavation of 4,781 cubic yards of material at \$17, caved-in over the tunnel arch. The petition sets forth the total cubic yardage of such material as 5,561 cubic yards, and excludes therefrom (a) 57 cubic yards claimed as above in Section V (2) of this petition, and (b) 723 cubic yards allowed for by the Court, Finding X in case No. K-366, and mentioned in Finding No. 1 hereinabove. There is no claim in the original petition in case No. K-366 for the excavation as such of this 4,781 cubic yards, but there is therein a claim for grouting and drypacking the space voided by the 5,561 cubic yards of caved-in material. See Sections IV and V of the original petition, case No. K-366. For drypacking in this area and grouting see the Court's findings in case No. K-366, Findings III and IV, on which the Court made no allowance.

Section V (3) of the petition in the instant suit makes claim to \$14,240.70, which plaintiff says remains unpaid for dry-packing the 5,561 cubic yards mentioned above (Section V (2) of the instant petition), being a balance of 4,746.9 cubic yards of drypacking at \$3 per cubic yard, plaintiff having been paid for 814.1 cubic yards only on the contracting officer's estimate. This item is substantially Section V of the original petition. See the Court's findings in case No. K-366, Findings III, IV, and VI. This item was not allowed in the judgment.

Section V (4) of the petition in the instant suit lays claim to \$56,362.10, as 18,790.7 bags of cement at \$3.00 per bag.

The correct extension is \$56,372.10. This is a claim for grouting, embodied in Section IV of the original petition, and embraced in the Court's findings in case No. K-366, Nos. III and VI, there indicated as consisting of 13,891 bags of cement pumped in grout into cavities in the timbered sections, not paid for, and 4,899.7 bags of cement used in grout poured into cavities in the rock section, the item of 4,899.7 bags being 9,032 bags consumed less a limit of 4,132.3 bags paid for. The Court did not include this item in its judgment of recovery.

The total number of bags of cement used in grouting, 22,923 bags, being the aggregate of 13,891 bags and 9,032 bags, converted by the liquid method described in the opinion of the Court, 76 C. Cls. 85, using 40 per cent of the dry-packed area as void, and one bag of cement to 2.62 cubic feet of grout, represents 5,561 cubic yards of space dry-packed and grouted. Of the excavation, dry-packing, and grouting involved in this cubic yardage, the defendant has had the use and benefit.

Unit prices named in the contract were for excavating \$17 per cubic yard, for dry-packing \$3 per cubic yard, and for grouting \$3 per bag.

All work was performed under the supervision of the contracting officer or his representative, and as directed by them.

3. The case comes to this Court under the special jurisdictional Act of February 27, 1942. The petition herein was filed July 7, 1942. The Act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.*

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

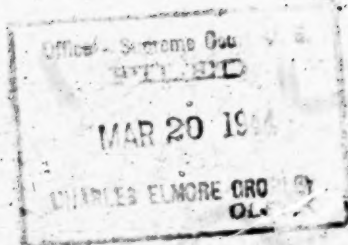
Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

Respectfully submitted,

EWART W. HOBBS,  
Commissioner.

FILE COPY



No. [REDACTED] 26

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**In the Supreme Court of the United States**

OCTOBER TERM, 1943

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ALLEN POPE, PETITIONER

v.

THE UNITED STATES

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT  
OF CLAIMS

---

**MEMORANDUM FOR THE UNITED STATES**

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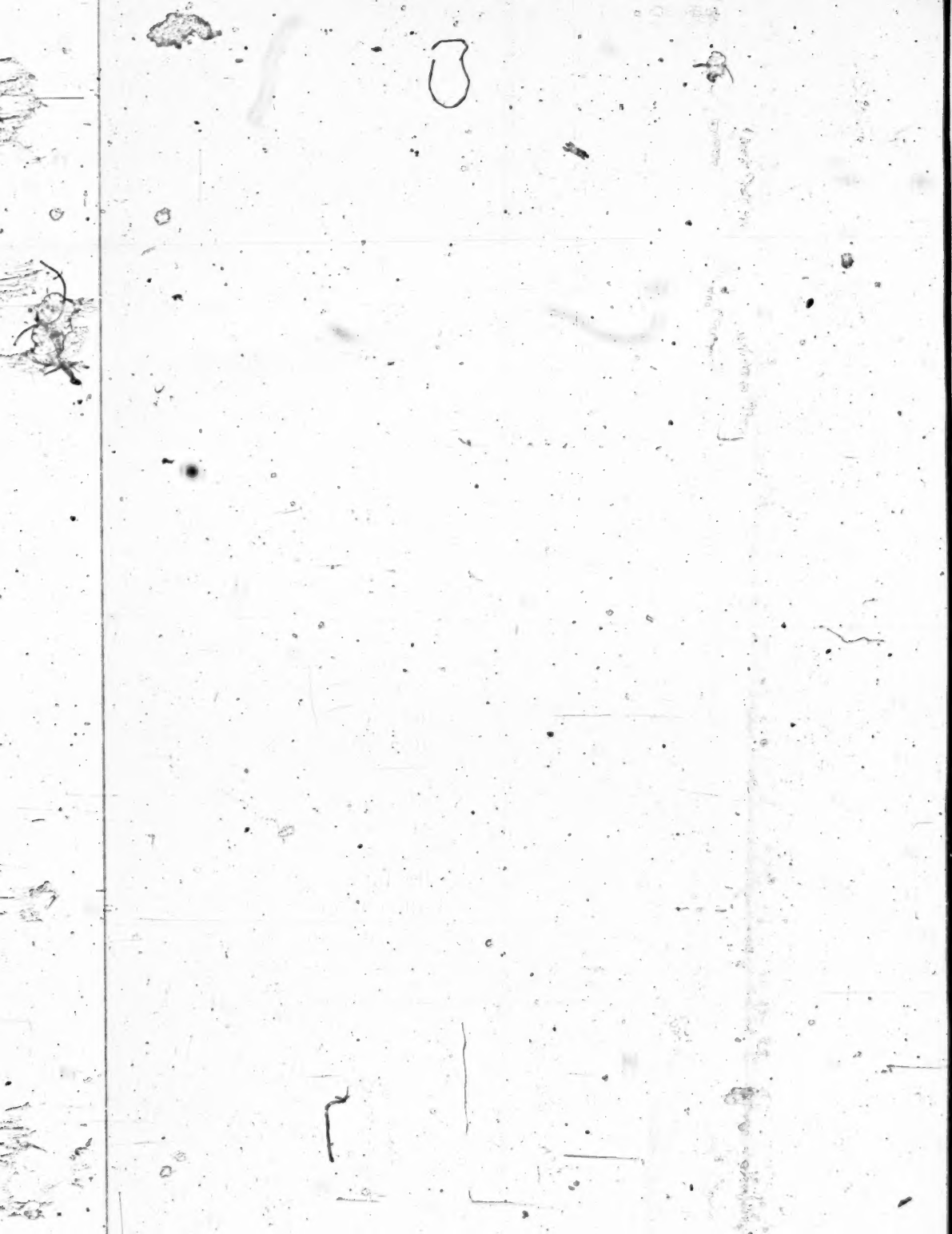
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(1)



# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 684

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT  
OF CLAIMS

---

## MEMORANDUM FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the Court of Claims (R. 47-60) is not yet officially reported.

### JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1944 (R. 60). The petition for a writ of certiorari was filed on February 10, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

**QUESTIONS PRESENTED**

The questions presented are:

1. Whether the Special Act of February 27, 1942, was properly construed below merely to direct the Court of Claims to enter judgment for the petitioner in an amount determinable by simple computation from data therein referred to.
2. Whether the Special Act as construed below is constitutional.

**STATUTE INVOLVED**

The Special Act of February 27, 1942 (56 Stat. 1122) is set forth in the Appendix, pp. 9-10 *infra*.

**STATEMENT**

On December 3, 1924, petitioner entered into a contract with the United States to construct a tunnel for the supply of water for the District of Columbia, and completed the work in 1927. In the course of construction, certain cave-ins occurred over the tunnel arch, requiring petitioner to excavate the materials which caved in, and to fill the caved-in spaces with concrete, dry packing, and grout. The contract established a so-called "B" line as the limit beyond which petitioner would not be paid for excavation or filling, but the cave-ins required such work beyond the "B" line (76 C. Cls. 64, 76-77, 79). Contending that the cave-ins were due to misrepresentations by the Government and to its change of the plans by lowering the "B" line 3 inches and by omitting

timber lagging from the sidewalls of the tunnel, petitioner brought suit in the Court of Claims to recover damages in the amount of \$306,825.33 for the additional work (76 C. Cls. 64). Jurisdiction of the Court of Claims was invoked under Judicial Code, § 145 (1), 28 U. S. C. 250 (1), vesting the court generally with jurisdiction over contract claims against the United States.

After a full trial, the court made findings of fact and rendered an opinion dealing with the issues involved (76 C. Cls. 78). The court found that the cave-ins were not due to any misrepresentations by the Government; that the changes in plans were not in writing as required by the contract; and that the contract price agreed to be paid, and which in fact was paid, was intended to cover such extra excavations and filling. However, the court allowed recovery for several items totalling \$45,174.46 (76 C. Cls. 64, at 102). Petitioner made several motions for a new trial, all of which were denied (81 C. Cls. 658; 86 C. Cls. 18). A petition for a writ of certiorari was also denied (303 U. S. 654). The judgment recovered by petitioner was duly paid (R. 48).

In 1942, petitioner secured the passage of the Special Act of February 27, 1942. Section 1 purported to confer jurisdiction upon the Court of Claims "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, deter-

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mine, and render judgment upon the claims of Allen Pope \* \* \* against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him" of a water supply tunnel in the District of Columbia.

Section 2 provided:

The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope \* \* \* for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Section 4 authorizes an application for a writ of certiorari to the Supreme Court.

Pursuant to this Act, petitioner instituted the present proceeding to recover an additional amount of \$162,616.80, representing the total charge at the contract unit prices for excavation and filling alleged not to have been paid for (R. 1-9). The United States filed a general traverse and additional testimony was taken. The Court of Claims, however, without making any additional findings of fact, dismissed the petition (R. 59). It construed the Special Act as ordering that court "to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce" (R. 50). Accordingly, it held the Special Act to be an unconstitutional encroachment by Congress upon the judicial function of the Court of Claims (R. 52-53). Judge Littleton dissented on the ground that the Act was merely an authorization by Congress to the Court of Claims to consider petitioner's claims in the light of waivers of various defenses and hence did not interfere with the proper judicial function of the court (R. 59-60).

#### ARGUMENT

The question whether Congress may direct the Court of Claims to reconsider a case already

finally disposed of by that court under its general jurisdiction, in a manner which leaves the court no choice but to enter judgment for the theretofore unsuccessful party in an amount determined by simple mathematical computation, is an important issue justifying review by this Court. The question involves the nature of the powers exercised by the Court of Claims.<sup>1</sup>

This Court will reach that issue, decided by the court below, only if it first construes the Special Act of February 27, 1942, as depriving the Court of Claims of jurisdiction to do anything but enter a judgment for the petitioner in a readily ascertainable amount. The statute is reasonably susceptible of that construction, which was the one adopted by the Court of Claims. In the court below, however, both parties took the position that the statute should be interpreted as vesting the Court of Claims with jurisdiction again to hear and determine petitioner's claims which that court had already decided against him, subject only to a waiver of the defenses of statute of limitations, *res judicata*, partial allowance and release, and that under the Special Act the Court of Claims was free to consider whether there was a legal basis for the asserted recovery, and was

<sup>1</sup> *Williams v. United States*, 289 U. S. 553; *Ex Parte Bakelite Corp.*, 279 U. S. 438; *United States v. Klein*, 13 Wall. 128; *Gordon v. United States*, 2 Wall. 561, 117 U. S. 697; *Pocono Pines Assembly Hotels Co. v. United States*, 73 Ct. Cls. 447.

not required merely to enter judgment for petitioner in an amount susceptible of simple mathematical computation.<sup>2</sup> We do not read the petition for certiorari (pp. 7-9) as taking a contrary position. The parties and the court below are in apparent agreement that the Act is valid if the interpretation put upon it by the parties below is correct.<sup>3</sup> If the parties were correct in their position that the Act should be construed so as to avoid the constitutional issue, this Court will not be called upon to decide the question of importance.

The question as to the construction of the Special Act is not, of course, of general significance. The Act here involved differs from the usual and familiar form of special jurisdiction statute which merely confers jurisdiction "to hear, determine, and render judgment" upon designated claims, occasionally with a waiver of specified defenses.<sup>4</sup> We have been able to find no other act with the additional provisions which raise the issues presented in this case.

<sup>2</sup> See Brief for the United States in Court of Claims, pp. 81-96; Second Supplemental Brief for the United States, pp. 255 *et seq.*; Supplemental Brief for Petitioner, pp. 246-247.

<sup>3</sup> The parties were also in accord below that the statute would be invalid if given the construction which the Court of Claims adopted. See note 2, *supra*.

<sup>4</sup> See e. g., the acts involved in *De Luca v. United States*, 84 C. Cls. 217; *Alcock v. United States*, 74 C. Cls. 308; *Mack Copper Company v. United States*, 97 C. Cls. 451.

These considerations indicate that the Court may not be called upon to decide the constitutional issue which alone makes a case involving this unusual type of Special Act of any importance.\*

Respectfully submitted.

✓ CHARLES FAHY,  
*Solicitor General.*

✓ FRANCIS M. SHEA,  
*Assistant Attorney General.*

✓ DAVID L. KREEGER,

✓ ROBERT L. STERN,  
*Special Assistants to the Attorney General.*

✓ MELVIN RICHTER,  
*Attorney.*

MARCH 1944.

\* If this Court should conclude, contrary to the views of the court below, that the Act constitutionally required the Court of Claims to make a non-judicial determination, it would be forced to dismiss the petition for certiorari, inasmuch as this Court itself has no jurisdiction to consider cases not of judicial cognizance. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428.

## APPENDIX

The Special Act of February 27, 1942 (56 Stat. 1122), provides as follows:

### AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use

and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

SEC. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

SEC. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

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OCT 11 1944

CHARLES ELMORE ORFLEY

No. 26

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**In the Supreme Court of the United States**

OCTOBER TERM, 1944

ALLEN POPE, PETITIONER

v.

THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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BRIEF FOR THE UNITED STATES

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# **In the Supreme Court of the United States**

**OCTOBER TERM, 1944**

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**No. 26**

**ALLEN POPE, PETITIONER**

**v.**

**THE UNITED STATES**

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**ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

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**BRIEF FOR THE UNITED STATES**

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## **OPINION BELOW**

The opinion of the Court of Claims (R. 47-59) is reported in 100 C. Cls. 375.

## **JURISDICTION**

The judgment of the Court of Claims was entered on January 3, 1944 (R. 60). The petition for a writ of certiorari was filed February 10, 1944, and granted April 3, 1944 (R. 61). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, and under Section 4 of the Special Act of February 27, 1942.

QUESTIONS PRESENTED

1. Whether the Special Act of February 27, 1942, was properly construed below as directing the Court of Claims to enter judgment for the petitioner in an amount determinable by simple computation from data referred to in said Act, on claims which the Court of Claims had theretofore decided in favor of the United States.

2. Whether the Special Act as construed below is unconstitutional as a legislative encroachment upon the judicial power of the Court of Claims.

3. Whether, even if construed as directing a new trial, the Special Act is invalid as the exercise of appellate jurisdiction by Congress.

4. Whether this Court has jurisdiction to review the determination of the court below.

STATUTE INVOLVED

The Special Act of February 27, 1942 (56 Stat. 1122) is set forth in Appendix A, pp. 143-144, *infra*.

STATEMENT

In 1924, the petitioner, Allen Pope, entered into a contract with the United States to construct a subterranean tunnel as part of the water supply system for the District of Columbia (R. 47; *Pope v. United States*, 76 C. Cls. 64). The contract permitted the use of "dry-packing" and "grouting"

The latter citation refers to the findings of fact and opinion of the Court of Claims, concerning the claims here involved, rendered in 1933.

in certain areas surrounding the tunnel, where cavities were left by the excavation (R. 43; 76 C. Cls. 80). To "dry-pack" an area, rocks of medium size are packed tightly into the interstices in the ground, and then "grout" (concrete of the consistency of soup) is pumped in, which, when it hardens, welds the rocks into a solid mass (76 C. Cls. 78, 79).

During the course of the work, there was constant disagreement as to the amount of dry-packing and grouting for which petitioner should be paid (*id.* 78-86). The drawings accompanying the contract designated, by a so-called "B" line, the outer limits of excavation for which payment would be made (R. 30). Where the tunnel passed through solid rock, the Government refused to pay for any dry-packing or grouting except such as had been placed within the "B" line (*i. e.*, between the outer masonry wall of the tunnel and the outside limits of compensable excavation) (76 C. Cls. 72, 84-85). In the other sections of the tunnel the Government paid only for such packing and grouting as its calculations, based upon measurements of the area, showed to have been placed above the crown of the tunnel arch (*id.* 65-72, 80-84, 86). The contractor, on the other hand, claimed compensation for whatever dry-packing and grouting he had done on the project, regardless of where it was placed (*id.* 81, 82, 86).

Certain changes made by the Government's contracting officer also resulted in disagreements.

The contracting officer lowered the "B" line by 3 inches, thus decreasing the area to be excavated, and also directed the omission of a quantity of "lagging" (timbered supports used on the side walls of certain sections of the tunnel). Cave-ins from the sides occurred, requiring that the caved-in materials be removed and that the spaces be filled with dry-packing and grout. Petitioner attributed the cave-ins to the omission of the lagging and sought to be compensated for the extra work consequent thereon (*id.* 74-75, 96-97).

Because of these disputed sums and others not now material, petitioner sued in the Court of Claims to recover some \$306,000 for breach of contract (R. 47). Jurisdiction of the Court of Claims was invoked under Judicial Code § 145 (1), 28 U. S. C. 250 (1), vesting the court generally with jurisdiction over claims founded upon a contract with the United States (R. 48).

After a full trial, the court made findings of fact and rendered an opinion dealing with the issues involved (76 C. Cls. 64, 78). The court denied recovery for the additional work consequent upon the changes made by the contracting officer because they had not been ordered in writing as required by the contract (*id.* 96-99). The court also denied recovery for the additional dry-packing and grouting (*id.* 78-86). However, on the other items of claim not here material, recovery was allowed in the sum of \$45,174.46 (*id.* 102).

The claim for dry-packing and grouting was disposed of as follows: The contractor sought payment for all the dry-packing and grouting which he calculated to have been employed in the project, regardless of where it was placed. He had no measurement of the space so treated, but predicated the amount of his claim on the "liquid method" measurement. That method derives the space dry-packed from the amount of grout used, which is in turn calculated from the number of bags of cement used.<sup>2</sup> Calculating the space dry-packed in this manner, the contractor sought to recover for dry-packing 5,561 cubic yards at the rate specified in the contract (*id.* 85, 86).

The Government denied liability for dry-packing and grouting outside the areas for which payment had already been made; and also disputed the reliability of the liquid method of measurement as proof of the areas actually dry-packed and grouted (*id.* 82). The liquid method of measurement is predicated upon the assumption that the grouting flows only into the cavities between the dry-packing, and evidence adduced at the hearing showed that this premise did not cor-

<sup>2</sup> One bag of cement will make 2.62 cubic feet of grout; and one cubic foot of grout will be necessary for the dry-packing in  $\frac{1.00}{.42}$  cubic feet of dry-packed space (a ratio of about 2.4 of area to 1 of grout). Hence, multiplying the number of bags of cement actually used by 2.62 cubic feet of grout, dividing the product by 0.42, and then dividing the quotient by 27 (the number of cubic feet in a cubic yard), it is theoretically possible to ascertain the cubic yards of space dry-packed.

respond with the facts in that a considerable quantity of grout had been forced into cavities outside the dry-packed area (*id.* 85).

The Court of Claims was of the opinion that the Government was liable for whatever dry-packing had been done and for so much of the grout as had actually found its way into the dry-packed areas (*id.* 85, 86). Recovery was refused, however, because of the deficiency in proof as to the areas so treated, the court agreeing with the Government that the seepage of the grout into ground remote from that dry-packed made the liquid method of measurement unreliable for determining the amount of either dry-packing or grouting (*id.* 85-86). The court accordingly found that the Government had "received the benefit" of the dry-packing actually done and the grouting in the dry-packed areas, but denied recovery for lack of proof of amount (*id.* 84-86).

Four motions for a new trial were made and denied (81 C. Cls. 658; 86 *id.* 18; 100 *id.* 375, 390), and a writ of certiorari was denied (303 U. S. 654). The judgment of \$45,174.46 recovered by petitioner was duly paid (R. 48).

On February 27, 1943, the Special Act under which the current suit was brought was approved (R. 1, 2). Section 1 purported to confer jurisdiction upon the Court of Claims, "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allow-

ance, to hear, determine, and render judgment upon the claims of Allen Pope \* \* \* against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him" of a water supply tunnel in the District of Columbia.

Section 2 provided:

The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope \* \* \* for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

Pursuant to this act, petitioner instituted the present proceeding to recover \$162,616.80, the total amount alleged to be due at contract prices for all the excavating, concreting, dry-packing, and grouting which had not previously been paid for (R. 1-9; 100 C. Cls. 391, 392). A hearing was held before a commissioner, but the Court of Claims made no findings of fact (R. 47); dismissing the petition on the ground that the Special Act under which it was brought was unconstitutional (R. 60).

Noting that the present suit had once been litigated to a final judgment under the court's general jurisdiction (R. 47-49), the majority of the court<sup>3</sup> rejected the Government's contention that to avoid constitutional questions the Special Act should be construed as resubmitting the matter for a new trial and as leaving the court free to decide the questions of law and fact involved (R. 50). The court held that the language of Section 2 was "mandatory as to how the case must be decided if the court undertakes the jurisdiction which the act purports to confer," and that the question presented was "whether Congress can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon

<sup>3</sup> Judge Madden delivered the opinion, in which Chief Justice Whaley and Judge Whitaker concurred (R. 47, 59).

data referred to in the special act would produce" (R. 50).<sup>4</sup> The court answered this question in the negative, relying upon *United States v. Klein*, 13 Wall. 128 (R. 50-53).<sup>5</sup>

Judge Littleton dissented on the ground that Section 2 simply described in detail the basis of the liability which the Government was willing to assume, and did not constitute an interference with the court's judicial function, even though the question had once been adjudicated (R. 59-60).

## SUMMARY OF ARGUMENT

### I

The court below construed the Special Act as directing it to enter judgment for petitioner in an amount determinable by simple computation on claims which had once been passed on, pur-

<sup>4</sup> The court thought that Section 2 directed it to perform the following "small and unimportant task": "to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract \* \* \* add the results, and render judgment for the plaintiff for the sum" (R. 49-50).

<sup>5</sup> The court stated that "It is not necessary for us to decide, and we do not decide, whether an act which merely granted a new trial, without directing the court how to decide the case upon the new trial" would infringe upon the judicial powers of the court, but the court strongly indicated that in its opinion such an act would likewise be invalid (R. 58). Cf. *Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447, 76 C. Cls. 334, motion for prohibition or mandamus denied, *Ex Parte Pocono Pines Assembly Hotels Co.*, 285 U. S. 526.

suant to that court's general jurisdiction and determined for the Government. It rejected the alternative construction urged by the Government that the Act merely resubmitted the matter for a new trial. This latter construction was urged in the court below to avoid the grave constitutional doubts raised by the construction adopted, but it is recognized that the former is the more reasonable in view of the statutory language and background.

## II'

A. The Special Act, as construed below, encroaches upon the judicial power and passes the limits placed upon legislative action by the Constitution. In deciding these claims the first time, the Court of Claims was, of course, exercising judicial power, reviewable by this Court. Congress may not compel a court to enter a new and different judgment, with terms legislatively prescribed, upon claims once passed upon and rejected pursuant to that court's general judicial jurisdiction. The elimination of all judicial discretion distinguishes this situation from those instances in which Congress has, subsequent to litigation, waived some technical defense and permitted readjudication for the purpose of securing a decision on the merits. Because the instant claims had once been litigated and a final judgment entered thereon, the Special Act likewise

differs from those acts which change the rules of law prior to or pending court action.

B. If the Act is construed as *directing* a new trial as compared with a waiver of *res judicata*, constitutional questions still remain. This Court has stated that to grant a new trial is a judicial function, and the state courts have been almost unanimous in considering a legislative grant of a new trial to be violative of the doctrine of the separation of powers. While this Court in *Cherokee Nation v. United States*, 270 U. S. 476, sustained such a direction, the statute was apparently regarded as merely a waiver of *res judicata*. The Court of Claims has not been consistent in result, but in the only cases where it has fully considered the matter it held that Congress may not grant a claimant a new trial. The legislature under such circumstances is exceeding its power in acting as an appellate tribunal and not as a lawmaking body.

### III

A. Whether the Court of Claims derives its judicial power from Article I of the Constitution or from Article III, Congress may not interfere with it in the exercise of its judicial power. While the protection accorded judges of constitutional courts in tenure and salary is bottomed upon the specific language of Article III, the doctrine of the separation of powers has no such narrow basis. It is

inherent in our form of government, as manifested by the structure and history of the Constitution. Regardless of the source of the judicial power of the Court of Claims, that doctrine requires that courts exercising such power be free from legislative interference. Congress may withhold the determination of claims against the Government from the judiciary entirely, but if it submits them to the courts it may not attempt to review and revise the executed judicial action. Where executive or legislative review of a judgment has been provided for, the courts have held that the proffered jurisdiction was not judicial power because the judicial determination would not be final as to the rights of the parties (*Hayburn's Case*, 2 Dall. 409; *United States v. Ferreira*, 13 How. 40; *Gordon v. United States*, 117 U. S. 697).

Congress could, of course, have paid the petitioner's claims despite the adverse judgment of the Court of Claims thereon without infringing the judicial power. But here Congress has directed the court to clothe a legislative conclusion in judicial habiliments, and if such power is conceded to Congress, unwise inroads upon the public treasury may escape either an adequate legislative or judicial check. By assuming judicial guise a payment will also escape the public scrutiny accorded political action, and shift the responsibility from Congress to the court.

Moreover, if Congress may at any time deprive the judgment of the Court of Claims of finality,

the power of this Court to continue to exercise appellate jurisdiction over the Court of Claims is very dubious. That appellate jurisdiction depends upon the judgments of the Court of Claims being final (*Gordon v. United States*, 2 Wall. 561, 117 U. S. 697; *Muskrat v. United States*, 219 U. S. 346).

B. Even if the doctrine of the separation of powers is applicable only to judicial power derived from Article III, the Court of Claims can claim its protection, since, we submit, its judicial power stems from that article. *Williams v. United States*, 289 U. S. 553, which holds the contrary, is inconsistent with prior authority, with constitutional history, and with the language of the Constitution, which expressly includes within the judicial power "controversies to which the United States shall be a party."

Less than three years after the adoption of the Constitution, the justices of this Court assumed that the inferior courts of the United States could act on claims against the Government if the judicial action were made final and placed beyond executive or legislative revision (*Hayburn's Case*, 2 Dall. 409; *United States v. Ferreira*, 13 How. 40). Congress created the Court of Claims because it desired to have controversies respecting claims against the United States determined judicially rather than legislatively, and to that end gave the court all the attributes necessary to an inferior court exercising the judicial power of the

United States, calling it a court, giving its judges life tenure, and otherwise indicating its belief that it was creating a constitutional court. This Court originally refused to accept the appellate jurisdiction given in 1863 because the decisions of the Court of Claims were not final (*Gordon v. United States*, 2 Wall. 561, 117 U. S. 697). This was speedily remedied by Congress and appellate jurisdiction has been assumed ever since (*United States v. Jones*, 119 U. S. 477). Insofar, then, as Congress has been able, it has made the Court of Claims a constitutional court.

The decisions of this Court prior to 1928 assumed that the judicial power exercised in relation to claims against the United States was part of that embraced within Article III, and that the Court of Claims was an inferior court created under Section 1 of that article. In 1929 *Ex parte Bakelife*, 279 U. S. 438, for the first time suggested by way of dictum that the Court of Claims was not a constitutional court, because it decided only matters arising between the Government and others, susceptible of judicial determination but not requiring it. And, in *Williams v. United States*, 289 U. S. 553, it was held that the Court of Claims was not a constitutional court because the suits against the United States over which it has jurisdiction do not come within the phrase in Article III: "controversies to which the United States is a party." This conclusion, concededly contrary to

the literal meaning of the language, was based upon a historical analysis designed to show that the immunity of the sovereign from suit precluded the application of that phrase to suits against the Government.

More complete historical research has shown no intention to withhold from the Federal courts jurisdiction over claims against the Government. The flaw in the reasoning in the *Williams* case is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. The premise that Article III is not a consent to suit is correct; but it does not follow that where such consent has been given, a suit against the Government is not a "controversy to which the United States is a party." While sovereign immunity was well known at the time of the framing of the Constitution, it was equally known that such immunity could be, and had been, waived both in England and here. Virginia, Delaware, Maryland, Georgia, North Carolina, Connecticut, and New Jersey had all submitted to judicial determination controversies involving the Government. Thus there is no reason for concluding that the Constitution was intended to have any but its literal meaning when it placed within the potential jurisdiction of the Federal courts controversies to which the United States is a party. We submit that the earlier authorities correctly held that the judicial power exercised in connec-

tion with claims against the Government lies within the judicial article, and that *Williams v. United States* was in error in holding the Court of Claims not to be a constitutional court.

C. The Court of Claims, as a constitutional court, may continue to exercise non-judicial functions just as do the courts of the District of Columbia; the plenary power exercised by Congress in creating each court is derived both from Article III and Article I. Advisory jurisdiction has been refused by the courts when requested to take judicial form, but the non-judicial duties of the Court of Claims are totally distinct, in procedure and in the form of result, from its judicial functions. The applicability of the doctrine of legislative courts to the territorial tribunals will not be affected by a departure from the *Williams* case, since these courts are specially treated because of the state of pupilage of the territories, their usually temporary status, and their peculiar character as property of the United States.

#### IV

If the Special Act calls for judicial action by the Court of Claims, this Court may undoubtedly review the determination made below. If, however, the Court of Claims was required to act in a non-judicial capacity, this Court may not be able to review its action in refusing jurisdiction (*Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S.

693).— That case may be distinguishable, however, in that there the court in construing the statute was clearly acting in an administrative and non-judicial capacity, whereas here the Court of Claims, in rejecting jurisdiction on the grounds of the unconstitutionality of the jurisdictional act, was making a decision peculiarly judicial in character and ordinarily reserved to the judiciary.

#### ARGUMENT

If the construction given to the Special Act by the court below was correct—and we think it the more reasonable of the two alternatives—we submit that the Act was properly held invalid as an encroachment by the legislature upon the judicial powers of the Court of Claims. The Act may also be invalid if it directs the granting of a new trial, as compared with a waiver of *res judicata*.

The conclusion that the Act is invalid is in our view not dependent upon whether the Court of Claims exercises judicial power derived from Article III of the Constitution, as the earlier decisions of this Court assumed, or judicial power derived from Article I, as was held in *Williams v. United States*, 289 U. S. 553. But if the origin of the judicial power is material, we suggest that the *Williams* case warrants reconsideration, since we believe its decision and rationale do not square with the relevant constitutional history.

THE CONSTRUCTION PLACED UPON THE SPECIAL  
ACT BY THE COURT OF CLAIMS IS THE MORE REA-  
SONABLE OF ALTERNATIVE CONSTRUCTIONS

The refusal of the court below to take jurisdiction was based upon its construction of the Special Act as "a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently" by rendering judgment for the prior losing party in an amount determinable by simple computation (R. 49-50, 52-53).

Realizing that such construction raised grave constitutional doubts as to the validity of the Special Act, and invoking the principle that in such circumstances a statute should be given a different construction if possible (*Panama R. R. Co. v. Johnson*, 264 U. S. 375, 390; *Chippewa Indians v. United States*, 301 U. S. 358, 376), the Government suggested in the court below that the act could be construed as a resubmission of the case to the court for a new trial. (See Memorandum for the United States filed with this Court in this case March 1944, p. 7, n. 2.) The Government's contention was based upon the possible existence of an ambiguity between Section 1, which empowers the Court of Claims in familiar jurisdictional language to "hear, determine, and render judgment" upon specified

claims,<sup>6</sup> and Section 2 (which is referred to in Section 1), directing a judgment for plaintiff and prescribing the formula for computing its amount. Under the proposed alternative construction, Section 2 would either be read as a description of petitioner's claims, or as specifying the amount of recovery if the court should find liability (cf. *Gulf Refining Co. v. United States*, 269 U. S. 125, 135-136), or would be dropped as an invalid separable part of the act.

The Government, however, recognized the considerable difficulties in the construction for which it contended. As between the two alternatives, the construction adopted below is undoubtedly more largely consistent with the statutory language and background. Cf. *Roberts v. United States*, 92 U. S. 41. Section 2, by directing the court "to determine and render judgment at contract rates upon the claims" of petitioner "for certain work performed for which he has not been paid, but of which the Government has received the use and benefit," is in effect an admission of liability. And

<sup>6</sup> Similar language has been construed as submitting the case to the court for judicial consideration and decision. *United States v. Mille Lac Chippewas*, 229 U. S. 498, 500 (to hear and determine); *Stanton v. United States*, 68 C. Cls. 379 (to hear, consider, and determine \* \* \* and to enter decree or judgment); *Randall v. United States*, 71 C. Cls. 152, certiorari denied, 283 U. S. 826 (to hear, consider, and determine \* \* \* and to enter decree or judgment against the United States). See also *United States v. Cumming*, 130 U. S. 452.

the detailed description in Section 2 of the work which has been performed and which should be paid for, plus a recital of the method by which compensation should be computed, would likewise seem to foreclose any issue as to the amount of damages.

While Section 3 makes reference to "additional evidence" to be taken at the hearing under the Special Act, Section 2 leaves no room for any change in result, whatever the additional evidence may be. For that section directs judgment at contract rates based not upon the work actually done, but upon the work previously "found by the court to have been performed"; and based not upon the materials actually used, but upon those "determined by the court's previous findings" (R. 1-2).\*

\* Petitioner in his main brief herein (blue cover, p. 17) compares the instant case to the special act applied in *Indians of California v. United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764. The comparison does not hold, for although the special act there involved prescribed the value of the land for which judgment could be rendered, it left to the court, without any prescribed formula, the ascertainment of the value of all the other items of recovery, such as livestock, clothing, implements, facilities, etc. (98 C. Cls. at 589). The act also submitted to the court the determination of a plea in set-off (id. 593, 599). Moreover, so far from directing entry of judgment for one of the parties, it merely submitted the case for the "determination of the equitable amount due" to plaintiffs (id. 592).

\* Judgment is to be rendered "at contract rates"; the "excavation and concrete work" for which payment should be made is that previously "found by the court to have been performed"; the "amount of dry packing" is "to be determined

For these reasons, we believe that the construction of the Special Act reached below was wholly reasonable and finds strong support in the language of the Act. Under that interpretation, the court's sole task under the act is "to refer to its previous findings, take certain cubic measurements and certain number of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results, and render judgment for the plaintiff for the sum" (R. 49-50).

The court's function would appear to be equally limited in regard to the claims "for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer," which lowered the upper "B" line 3 inches and

by the liquid method \* \* \* based on the volume of grout actually used"; and "the amount of grout" is "to be determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing" (R. 1-2).

Petitioner contends (Br. 20) that this is not a dictation to the court "as to method or amount," but "merely authorized the court" to use that method (Supp. Br. [white cover] 28, 29). The language of Section 2, which uses words of direction and not words of description, is sufficient refutation of this contention. The amount of dry packing is "to be determined" by the liquid method and likewise the amount of grout is "to be determined" by certain previous findings of the court—a verb form which looks to the future and clearly refers to the function imposed upon the court "to determine and render judgment."

omitted the timber lagging from the side walls of the tunnel. In the previous action, the court had found that pursuant to these orders, the contractor had removed 287 cubic yards of material, replacing it with an equal amount of cement. This entitled him to \$10,727 at contract rates. The court, however, had denied recovery because the change orders had not been in writing. Here, too, the judgment to be rendered is to be based not upon new evidence but upon the work previously "found by the court to have been performed." And the Special Act, in directing the court "to render judgment at contract rates" for the work done pursuant to the change orders, apparently required judgment for \$10,727, regardless of whether or not such orders were in writing.\*

As an example of the result which the Special Act would produce if followed to the letter, the court below stated that it would require a judgment of some \$81,000 for petitioner for "exca-

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\* This was the construction placed upon the bill by the Attorney General when asked for his opinion prior to its enactment (Letter of April 28, 1941, from Attorney General to Hon. Dan R. McGehee, Chairman, Committee on Claims, House of Representatives). However, the Committee Report states that the Act does not waive the requirement that change orders be in writing, since the Committee had concluded that the court was in error in not finding that the orders here in question were actually in writing (H. Rept. No. 865, 77th Cong., 1st Sess., pp. 3, 4). But while Congress may have thought the error obvious, the Act does not make recovery on these claims dependent upon agreement by the court with the legislative assumption.

vating materials which caved in over the tunnel arch," despite the fact that the payment for grouting and dry-packing was intended to cover the work of removing such caved-in materials (R. 55-57).<sup>10</sup> Petitioner argues that by characterizing this claim as unmeritorious, the court below has in fact exercised "the very kind of authority which it says the act does not confer" (Br. 21). This contention misconceives the point made by the court below, which was not to hold the claim without merit but to show that the Special Act directs judgment for a claim which the court, if left to the exercise of a judicial function, would never allow. The fact that the court had no power under the Special Act to implement its views on the merits of the claim by an appropriate judgment supports its view that it was prevented from judicially determining the claim.

## II

### THE SPECIAL ACT, AS CONSTRUED BELOW, IS AN IMPROPER LEGISLATIVE ENCROACHMENT UPON THE JUDICIAL POWER

When the Court of Claims first decided petitioner's claims in 1933, under the general juris-

<sup>10</sup> Petitioner argues that the court is left free to determine the amount of excavation (Supp. Br. 28). But it is clear that since petitioner claims to have filled all excavated spaces with dry-packing, and since Section 2 directs the court to determine the space dry-packed according to the number of bags of cement used, the cubic quantity of materials excavated would necessarily be identical with the cubic quantity of dry-packing.

diction vested in it by Section 145 (1) of the Judicial Code (28 U. S. C. 250 (1)), it, of course, exercised judicial power (*Williams v. United States*, 289 U. S. 553, 567; see *United States v. Sherwood*, 312 U. S. 584, 587). While this Court denied certiorari from the 1933 decision (303 U. S. 654), it had jurisdiction to review the case (Act of February 13, 1925, c. 229, Section 3 (b), 43 Stat. 939, 28 U. S. C. 288 (b); *United States v. Jones*, 119 U. S. 477).<sup>11</sup>

As construed below, the Special Act constitutes a legislative direction to the Court of Claims to set aside the judgment adverse to petitioner which had already been rendered in a judicial proceeding, and instead to enter a judgment in favor of petitioner upon the same facts, in an amount readily ascertainable by simple mathematical computation from the previous findings of the court. The function thus called for was purely ministerial, requiring no exercise of judicial discretion. Cf. *Clark v. Williard*, 292 U. S. 112, 118; *Cole v. Violette*, 319 U. S. 581, 582; *Gulf Refining Co. v. United States*, 269 U. S. 125.

<sup>11</sup> Whether a proceeding "is a judicial one" depends "upon the nature of the proceeding which Congress has provided." See *Tutun v. United States*, 270 U. S. 568, 576. The proceedings in the Court of Claims are obviously judicial in nature, involving adverse parties, pleadings, a trial and hearing on both fact and law, a record of evidence and other proceedings, and a judgment which is final unless reviewed by this Court. See 28 U. S. C. 265, 269, 274-278, 281-286, 288.

135-136; *Mower v. Fletcher*, 114 U. S. 127, 128.

We believe the court below was correct in holding that Congress has no power to nullify a judicial decision of the Court of Claims which had become final, and to direct that court to perform the ministerial function of entering a different judgment upon the same facts.

If this Court should reject the construction below and should hold that the Special Act directs a new trial, as contrasted with a mere waiver of *res judicata*, we suggest that the Act would likewise be invalid as an exercise of appellate jurisdiction reserved by the Constitution to the courts.

In this Point we shall consider whether Congress possess the right to interfere in the manner referred to with the performance of the judicial function generally. In Point III we shall consider whether the Court of Claims is subject to the same protection as other courts against legislative interference of this sort.

A. AN ACT SETTING ASIDE A JUDGMENT AND DIRECTING THE ENTRY OF A DIFFERENT ONE, INTERFERES WITH JUDICIAL POWER

The Special Act constitutes a greater interference with the judicial power than has ever previously been countenanced by this Court, or even tacitly accepted by the court below. Never has this Court sanctioned a statute whose purpose and effect were, as here, to nullify a judicial decision and to control and direct judicial action

in the same case. On the contrary, it has held that a statute which prescribes "rules of decision to the Judicial Department of the government in cases pending before it," thereby passes "the limit which separates the legislative from the judicial power" (*United States v. Klein*, 13 Wall. 128, 146, 147). The result would seem to follow *a fortiori* where the rule of decision is prescribed in a case already decided.

In the *Klein* case the Court of Claims had rendered a judgment for plaintiff under a general statute of 1863, for the value of property captured by the Union Army during the Civil War. Plaintiff's right to sue depended upon a Presidential pardon for participation in the "rebellion." While the judgment was pending on appeal to this Court, Congress passed an act in 1870 providing that whenever it was shown that a suit under the 1863 act was based upon such a pardon, the jurisdiction of the Court of Claims over the suit should cease; and that whenever it should appear that a judgment of the Court of Claims had been founded on such a pardon, this Court should immediately dismiss any appeal in such a suit for want of jurisdiction (16 Stat. 235). The 1870 act was held unconstitutional for the reasons expressed in the opinion of Chief Justice Chase (13 Wall. at 146):

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely

on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not \* \* \*

The Chief Justice also said (13 Wall. at 147):

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

If the principle of this case is applicable here, as we believe it is, the decision below is entirely correct. For the Special Act plainly prescribes "a rule for the decision of a cause in a particular way." While Congress, representing one of the parties to the controversy, is not here deciding the controversy in favor of the Government, as in the *Klein* case, the legislative direction as to the result to be reached by the court is no less specific

and mandatory. In the instant case, as in the *Klein* case, the court is instructed to enter a specified judgment after ascertaining a simple fact from the prior record in the case: there, the recital in the pardon; here, the number of bags of cement and like data set forth in the court's earlier findings. There is indeed an even greater interference with judicial power here than in the *Klein* case. There the statute was of general application and affected a case pending on appeal. Here the statute is directed at a single case which had been finally decided, and in which certiorari had been denied by this Court.

The principles given effect in the *Klein* case have been repeatedly recognized by this Court, in terms even more clearly applicable to this case. Thus, in a decision upholding a statute granting a "new remedy by way of review" in an appellate court, this Court stated that "it is undoubtedly true that legislatures cannot set aside the judgment of the courts, compel them to grant new trials, \* \* \* or direct what steps shall be taken in the progress of a judicial inquiry" (*Stephens v. Cherokee Nation*, 174 U. S. 445, 478). Again, in *James v. Appel*, 192 U. S. 129, 136, a territorial statute providing that motions for new trials were to be deemed overruled if not acted upon before the end of the term, was attacked as "an unconstitutional assumption of judicial functions" by the legislature. Mr. Justice Holmes,

speaking for the majority of this Court, upheld the statute and rejected this contention on the ground that "the legislature does not direct a judgment but merely removes an obstacle to a judgment already entered" (192 U. S. at 136). And in *Paramino Co. v. Marshall*, 309 U. S. 370, 378, this Court upheld a private act of Congress authorizing administrative review of an award of compensation for disability theretofore made by the Employees' Compensation Commission, notwithstanding that it resulted in the award of additional compensation for the disability after expiration of the original time for review. Speaking for the Court, Mr. Justice Reed concluded that the legislation was not "an excursion of the Congress into the judicial function," pointing out that the "private act does not set aside a judgment, create a new right of action or direct the entry of an award" (309 U. S. at 378; see also 309 U. S. at 381, and note 25).

The constitutional obstacles to the overturning of a judgment by the legislature, even in a field in which its power is plenary, have been vividly described by Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. United States*, 320 U. S. 118, which involved a proceeding to cancel a certificate of naturalization on the ground that it had been "illegally procured," brought under § 15 of the Naturalization Act of 1906 (34 Stat. 596).

The majority of this Court refused to consider, as not necessary to its decision (320 U. S., at 124)

whether, aside from grounds such as lack of jurisdiction or the kind of fraud which traditionally vitiates judgments, cf. *United States v. Throckmorton*, 98 U. S. 61; *Kibbe v. Benson*, 17 Wall. 624, Congress can constitutionally attach to the exercise of the judicial power under Article III of the Constitution, authority to re-examine a judgment granting a certificate of citizenship after that judgment has become final by exhaustion of the appellate process or by a failure to invoke it.

Mr. Justice Rutledge, concurring with the majority in the conclusion that the evidence adduced had not been sufficient to justify cancellation, emphasized (at pp. 168-169) —

the vital fact that it is a *judgment*, rendered in the exercise of the judicial power created by Article III, which it is sought to overthrow, not merely a grant like a patent to land or for invention. Congress has plenary power over naturalization. That no one disputes. Nor that this power, for its application, can be delegated to the courts. But this is not to say, when Congress has so placed it, that body can decree in the same breath that the judgment rendered shall have no conclusive effect. Limits it may place. But that is another matter from making an adjudication under

Article III merely an advisory opinion or prima facie evidence of the fact or all the facts determined. Congress has, with limited exceptions, plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority. To say, therefore, that the trial court's function in this case is the same as was that of the admitting court is to ignore the vast difference between overturning a judgment, with its adjudicated facts, and deciding initially upon facts which have not been adjudged. \* \* \*

It is no answer to say that Congress provided for the redetermination as a part of the statute conferring the right to admission and therefore as a condition of it. For that too ignores the question whether Congress can so condition the judgment and is but another way of saying that a determination, made by an exercise of judicial power under Article III, can be conditioned by legislative mandate so as not to determine finally any ultimate fact in issue.

It is clear that the Special Act here involved represents the type of legislative interference with

<sup>12</sup> In *Johannessen v. United States*, 225 U. S. 227, 241, this Court sustained the statute involved in the *Schneiderman* case as a "new form of judicial review" of a judgment, but assumed that it would be bad if it had represented "an exercise of the judicial power by the legislative department."

the judiciary which all these cases condemn. The statute is not one of general applicability, which is given effect in a pending judicial inquiry, such as was involved in *Carpenter v. Wabash Ry. Co.*, 309 U. S. 23; *Rafferty v. Smith, Bell & Co.*, 257 U. S. 226; see also *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 542. It has reference only to the particular claims of Allen Pope and its sole purpose is to have the Court of Claims render a more favorable judgment for him than he had previously obtained in that court on identical facts.

Petitioner compares the Special Act to those given effect by the Court of Claims in *Nock v. United States*, 2 C. Cls. 451; *De Luca v. United States*, 84 C. Cls. 217; *Murphy v. United States*, 35 C. Cls. 494; and *Alcock v. United States*, 74 C. Cls. 308. Each of those statutes permitted the relitigation of claims which had formed the subject of a previous suit in the Court of Claims. But in each case some technical defense had operated to defeat recovery and had prevented consideration of the merits of the claims; the acts eliminated such defenses either by expanding the jurisdiction of the court or by waiving particular defenses, thus converting a moral or equitable obligation into a legal one.<sup>1</sup> But whereas those acts eliminated some ob-

<sup>1</sup> The statute involved in *Nock v. United States*, 2 C. Cls. 451, permitted a second suit to be brought to be decided "in accordance with the principles of equity and justice" after a first suit for breach of contract had been defeated on the

stacle to the exercise of judicial discretion, the instant act seeks to prevent such exercise; and whereas those acts left the court free to consider and apply the facts and the law to the changed situation, according to customary legal principles, the instant act denies such freedom and compels a specified result.

It may perhaps be urged that the requirement that the change orders be in writing is a technical defense which may be waived like any other. But the Special Act does not stop with the waiver of this and other defenses such as *res judicata*, release, and the statute of limitations. It does not direct the Court of Claims to determine "technical legal ground" that the contract as originally written gave the Government the right to rescind whenever it pleased. That before the court in *Murphy v. United States*, 35 C. Cls. 494, was construed by the court as conferring "equitable jurisdiction" upon it and as eliminating "those rigid rules of law" originally applicable to the case. The statute on which the suit in *Ahock v. United States*, 74 C. Cls. 308, was based, waived the defense of the Government's nonliability for tort and of no action by Government officers under color of authority. *De Luca v. United States*, 84 C. Cls. 217, concerned a statute which waived the defense of previous settlement.

Contrary to the assumption apparently made by the House Committee in its report (H. Rept. No. 865, 77th Cong., 1st Sess.), the failure to put the change orders in writing was not the ground for denying recovery as to all of the rejected items, but related to less than half the claims in suit. See 76 C. Cls. 74-75, 96-99.

whether any order, oral or written, was made, that is, to decide the case judicially on the basis of the waiver of the defense. On the contrary, it directs the court to render judgment in an amount ascertainable by reference to findings which the court had previously made as a basis for a contrary judgment. Without altering the legal rules which had impelled judgment for the Government, Congress has directed the Court of Claims, upon the same findings and the same record, to enter judgment for petitioner in a prescribed amount.

This case is to be distinguished from the situation which arises when Congress enacts a law in advance of litigation, even when it is to be applied only to a specific case. See *Menominee Indians v. United States*, C. Cls. No. 44,298, decided February 7, 1944. Such legislation may even affect judgments already rendered, to the extent that they are continuing and affect future conduct, but not to the extent that they have adjudicated rights. For instance, after this Court had affirmed a decree directing the abatement of a bridge as an obstruction to navigation, Congress passed an act authorizing maintenance of that bridge as a postroad for the mails. This Court gave effect to that statute, dissolving the prior decree (*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 437), but expressly noted the distinction between the power of Congress to

alter the illegality of the bridge for the future, and the absence of power to affect the operation of the decree in respect of rights already adjudicated, such as the right to costs and damages.<sup>15</sup> And in the *Klein* case this Court distinguished the *Wheeling Bridge* case on the ground that (13 Wall. at 146-147):

No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence

<sup>15</sup> Mr. Justice Nelson said (18 How. at 431-432):

"Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles; and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced."

should have, and is directed to give it an effect precisely contrary.<sup>16</sup>

The crucial distinctions between the instant case and the cases in which Congress has affected pending or future litigation are these: Either the suit had not been terminated, or if it had, Congress permitted readjudication under altered rules or defenses without dictating the result. The courts were left free to assess the effect of the Congressional act and to determine whether an equitable or a moral or a technically unrecoverable obligation had, due to such act, become a legal and recoverable one; they were not directed to find legal, or to treat as binding, what they had found not to be legal or binding. The courts were not ordered to decide a particular case in a particular way; they were free to grant or deny judgment, as they deemed proper.

<sup>16</sup> For the same reason: the statutes involved in *Menominee Indians v. United States*, *supra*; *Indians of California v. United States*, 98 C. Cls. 583, certiorari denied, 319 U. S. 764; *Vigo's Case*, 21 Wall. 648; and *Roberts v. United States*, 92 U. S. 41, cited by petitioner, are distinguishable, since by waiving some technical defense or changing an applicable rule of law, Congress created "new circumstances" to which the court was left free "to apply its ordinary rules." In the same category are *United States v. Hossmann*, 84 F. (2d) 808, 810 (C. C. A. 8); *James v. United States*, 87 F. (2d) 897 (C. C. A. 8); *United States v. McKee*, 91 U. S. 442; *Bradley v. United States*, 16 C. Cls. 389; *Garrett v. United States*, 70 C. Cls. 304; *Cross v. United States*, 14 Wall. 479; *Harvey v. United States*, 105 U. S. 671; *United States v. Cumming*, 130 U. S. 452.

B. IF CONSTRUED AS DIRECTING A NEW TRIAL, THE  
SPECIAL ACT MAY ALSO BE INVALID

The court below held, and we believe correctly, that the Special Act does not merely grant a new trial, since it does not leave it to the court to determine whether upon reconsideration the prior decision should be modified, but requires the court to enter judgment within the bounds set forth in the Act. But even if the Special Act should be construed to require the court to rehear a case previously determined by it under its general jurisdiction, it is doubtful whether it would not overstep the limits which separate the legislative from the judicial power. This Court has recognized that to grant a new trial is a judicial function (*Stephens v. Cherokee Nation*, 174 U. S. 445, 478; *Wallace v. Adams*, 204 U. S. 415, 422),<sup>17</sup> and while it has upheld an act which "authorized, empowered, and directed" the Court of Claims to rehear part of a claim, it apparently regarded the statute primarily as a waiver of *res judicata* (*Cherokee Nation v. United States*, 270 U. S. 476).

<sup>17</sup> A direction to a court to rehear a case upon which it has already passed is to be distinguished from the grant of a new remedy by way of judicial review by a coordinate or appellate tribunal, to determine whether error, fraud, or other impropriety had taken place. *Wallace v. Adams*, 204 U. S. 415, and *Johannessen v. United States*, 225 U. S. 227, involved statutes of this character. Cf. *Schneiderman v. United States*, 320 U. S. 118, 124.

<sup>18</sup> The opinion in *Cherokee Nation v. United States* does not discuss whether a direction to this Court to grant a new

The state courts which have considered the matter have been practically unanimous in condemning as an invasion of judicial authority statutes purporting to grant a new trial (*Dorsey v. Dorsey*, 37 Md. 64; *Petition of Sibley*, 148 Minn. 347, 182 N. W. 168; *Merrill v. Sherburne*, 1 N. H. 199; *Matter of Greene*, 166 N. Y. 485, 60 N. E. 183; *De Chastellux v. Fairchild*, 15 Pa. 18; *Taylor & Co. v. Place*, 4 R. I. 324; and see 3 A. L. R. 450, which collects the cases including the few decisions to the contrary). A statute authorizing, but not requiring, a court to grant a new trial falls in a different category; it has the effect of waiving an impediment to a new trial (such as *res judicata*, or the term rule) but still leaves the matter to the court for determination.

It is true that the Court of Claims has not been entirely consistent in this respect. Thus, *Grant v. United States*, 18 C. Cls. 732 (appeal dismissed for lack of jurisdiction, 110 U. S. 225), gave effect in 1883 to a statute directing it "to reopen and readjudicate" an already decided case upon the evidence previously submitted, to determine trial as contrasted with a waiver of an adjudication would be constitutional (cf. 270 U. S. at 486). It cited *Noel v. United States*, 2 C. Cls. 451, in which the Court of Claims stated that an attempt by Congress "to award judgment" or "to grant a new trial judicially" would exceed the powers of Congress, unlike a statute permitting readjudication. Cf. *United States v. Hassman*, 84 F. (2d) 808 (C. C. A. 8); *James v. United States*, 87 F. (2d) 897 (C. C. A. 8); *Hampton & Branchville R. R. Co. v. United States*, 89 C. Cls. 117.

whether there had been error in the entry of judgment. And in 1900, *Murphy v. United States*, 35 C. Cls. 494, applied an act remanding a decided claim "for a further hearing" upon the former evidence and new evidence, to be redecided under "equitable jurisdiction." But in neither case were constitutional questions raised or discussed. And in 1932, when the matter was fully considered, the Court of Claims unanimously stated that Congress could not validly direct the court to grant a new trial in a case already adjudicated under its general jurisdiction (*Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447).<sup>19</sup>

The vice in a legislative direction to a court to grant a new trial is that under such circumstances the legislature is acting not as a law-making body but as an appellate court. It remands the case presumably because it considers the court to have erred either in its finding of the facts or in its determination or application of the law. These are peculiarly the functions of an appellate tribunal and are not exercisable by Congress. Cf. *Hayburn's Case*, 2 Dall. 409.

<sup>19</sup> The majority construed the statute as merely calling for an advisory opinion and held the act to be constitutional (73 C. Cls. at 500-502); the minority, construing the act as calling for another judicial decision, held it to be unconstitutional (*id.* at 502-504). Both agreed, however, that if in fact the statute directed a new judicial trial, it would be void (*id.* at 499-500, 507).

## III

THE JUDICIAL POWER OF THE COURT OF CLAIMS IS  
 NOT SUBJECT TO LEGISLATIVE INTERFERENCE

The above principles would, in our view, unquestionably invalidate a statute containing the provisions of the Special Act as construed below, if directed to a court, such as the Federal district court exercising judicial power under Article III of the Constitution. The question remains whether the same rule applies to the Court of Claims when adjudicating claims against the United States.

A. CONGRESS MAY NOT INTERFERE WITH THE JUDICIAL  
 POWER OF THE COURT OF CLAIMS WHETHER IT BE  
 DERIVED FROM ARTICLE I OR ARTICLE III OF THE  
 CONSTITUTION

The *Klein* case assumes that the Court of Claims is one of the "inferior courts" in which "the judicial power of the United States" has been vested under Article III of the Constitution (13 Wall. at 147). More recently this Court has held that the Court of Claims is not a constitutional court exercising judicial power under Article III, but is a legislative court created by Congress under its power to pay the debts of the United States (Article I, Sec. 8), and exercises "judicial power" under Article I, so that its judges are not included within the guarantee in Article III, Sec. 1 against diminution of compensation during

tenure in office." (*Williams v. United States*, 289 U. S. 553).

It may perhaps be argued that this decision impliedly overrules the *Klein* case; that the freedom of the judiciary from interference by the legislative is derived from Article III, which the *Williams* case held inapplicable to the Court of Claims; and that as the creature of the legislature, the Court of Claims is absolutely subject to its dictates (Cf. Pet. Br. 33). As we show hereinafter (pp. 86-103), we believe the *Williams* case erred in holding that the Court of Claims, when adjudicating claims against the United States, is not exercising "judicial power" embraced within Article III. But whether or not this is so, the decision in the *Williams* case does not conflict with the conclusion below.

### 1. *The Independence of the Judicial Power is Basic to Our Form of Government*

The source of the judicial power of the Court of Claims may be material in determining the power of Congress to reduce the compensation of its judges during their term; it is not necessarily controlling as to the power of Congress to nullify an exercise of judicial power, whencesoever derived, and to dictate its reexercise towards a dif-

<sup>20</sup> The act creating the Court of Claims provides for tenure during good behavior, *i. e.*, for life (Judicial Code § 136, 28 U. S. C. 241).

ferent result. The guarantee in Article III, Sec. 1 of a life term without diminution of original compensation applies to judges of the Supreme and "inferior courts" in which that Section vests the "judicial power of the United States;" hence, it may logically be held applicable solely to judges exercising judicial power under Article III, Sec. 2. But the doctrine of the separation of powers, which would preclude the exercise of judicial power by Congress and the interference by Congress with the exercise of such power by the courts, does not come from Article III alone, nor indeed from any mechanical arrangement of the Constitution into separate articles and sections—although the doctrine finds support in the tripartite division of governmental functions into legislative, executive, and judicial in Articles I, II, and III. The doctrine, we submit, is basic to the structure of our Government and is founded on the recognition of the sound policy of separating three essentially different powers of Government and making each independent of the others. When judicial power is being exercised, the reasons for requiring that it be "free from the remotest influence, direct or indirect, of either of the other two powers" (*O'Donoghue v. United States*, 289 U. S. 516, 530) are no less strong where such power is derived from Congress than where it originates in Article III.

This is implicit in several decisions of this Court. In *James v. Appel*, 192 U. S. 129, this Court upheld a territorial statute that was attacked as usurping judicial power, distinguishing it from one which "directs a judgment" (192 U. S. at 136). The Court was there dealing with a territorial court, deriving its judicial power under Article IV—as had been established by *American Insurance Co. v. Canter*, 1 Pet. 511—and yet it was assumed that the doctrine of separation of powers governed. And at a time when the Courts of the District of Columbia were considered to be legislative courts (*Hornbuckle v. Toombs*, 18 Wall. 648, 655), the Court of Appeals of the District held in *Ross v. Cemetery*, 8 App. D. C. 32, that the principle of separation of powers precluded congressional nullification of a judgment of the Supreme Court of the District. The doctrine of separation of powers has also been treated as applicable to naturalization proceedings, although these, like controversies respecting claims against the Government, need not be submitted to the judiciary for determination (*Johannessen v. United States*, 225 U. S. 227; Rutledge, J., concurring in *Schneiderman v. United States*, 320 U. S. 118, 165), a characteristic which this Court in *Williams v. United States*, 289 U. S. 553, 580, indicated is true only of judicial power derived from Congress' plenary power under Article I.

The requirement that judicial acts be free from legislative interference is not peculiar to our

Constitution, but rests on traditions which Anglo-American law has found to be inherent in our system of government. In *Gordon v. United States*, 2 Wall. 561, the Supreme Court held it had no jurisdiction of an appeal from a judgment of the Court of Claims which was subject to revision and approval by the Secretary of the Treasury. The reason for this decision, set forth in a draft opinion prepared by Chief Justice Taney (117 U. S. 697),<sup>21</sup> was that the powers of the Supreme Court had been "placed \* \* \* beyond the reach of the powers delegated to the Legislative and Executive Departments" (117 U. S. at 701). The Chief Justice made it clear that this principle antedated the Constitution and rested upon sound policy. After pointing out the difference between judicial power under the Constitution and the judicial power of the English courts,

<sup>21</sup> Mr. Chief Justice Taney placed his draft opinion in the hands of the clerk in vacation to be delivered to the members of the Court at their reassembly, but the Chief Justice died before the judges met. The clerk complied with his request, however, and—

"It is the recollection of the surviving members of the court, that this paper was carefully considered by the members of the court in reaching the conclusion reported in 2 Wall. 561; and that it was proposed to make it the basis of the opinion, which, it appears by the report of the case, was to be subsequently prepared. The paper was not restored to the custody of the clerk, nor was the proposed opinion ever prepared. At the suggestion of the surviving members of the court, the reporter made efforts to find the missing paper, and, having succeeded in doing so, now prints it with their assent" (117 U. S. 697).

which unlike our courts cannot declare an act of the legislature void because inconsistent with Constitutional principles. Mr. Chief Justice Taney said (117 U. S. at 705-706):

\* \* \* Yet in that country, the independence of the Judiciary is invariably respected and upheld by the King and the Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution, and where it is inoperative and of no value, unless sanctioned by a future act of Parliament. The judicial power is carefully and effectually separated from the executive and legislative departments. The language of Blackstone upon this subject is plain and unequivocal. (1 Bl. Com. 268, 269).

"In this distinct and separate existence (says Blackstone) of the judicial power in a peculiar body of men, nominated indeed but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any State unless the administration of common justice be in some degree separated from the legislative and executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions and not by any fundamental principles of law, which, though

legislators may depart from, yet judges are bound to observe. Were it joined with the executive, the union might soon be an over-balance for the legislative. \* \* \*

These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this Court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the Court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.<sup>22</sup>

The *Williams* case held that the Court of Claims does not exercise judicial power under Article III, because its jurisdiction is confined to claims against the Government, a subject matter which does not require, although it is susceptible of, judicial disposition (289 U. S. at 580). But in holding the judiciary free from interference by the legislative, this Court has never indicated that the origin of the judicial power being exercised—or whether the subject of the particular case necessitated submission to the judiciary—determines whether Congress may interfere with it. On the

<sup>22</sup> See also 10 Holdsworth, *History of English Law*, pp. 644, 648-649.

contrary, this Court has applied the principle of the judiciary's independence in numerous decisions cited but not overruled in the *Williams* case, which likewise dealt with claims against the United States.

The earliest instance was *Hayburn's Case*, 2 Dall. 409, decided in 1792, less than three years after the Constitution became effective; in which three circuit courts, whose membership included 5 of the 6 justices of the Supreme Court, ruled that they could not take jurisdiction under an act of Congress authorizing the circuit courts to hear and advise the "Secretary at War" as to the merits of certain pension claims against the Government. The Circuit Court for the District of North Carolina, which included Justice Iredell, placed this conclusion on the ground, *inter alia*, that—

\* \* \* no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

In *United States v. Ferreira*, 13 How. 40 (1851) this Court again refused to take jurisdiction under a similar statute, and in *Gordon v. United States*, 117 U. S. 697 (1864), it declined appellate jurisdiction over the Court of Claims because the

decisions of that body were then subject to executive revision or approval. The uniform rationale of these decisions was that the executive and legislative power to revise a court's determination deprived it of its judicial character, so that the tribunal asked to make a determination which is subject to legislative revision could do so only as "commissioners" aiding the legislative branch; and since it was not exercising the judicial functions of a court, it was not subject to the appellate power of the Supreme Court. See *Hayburn's Case*, 2 Dall. at 409, 412; *United States v. Ferreira*, 13 How. at 46-50; *Gordon v. United States*, 117 U. S. at 702. As soon as the feature of executive supervision was eliminated, making the decision of the Court of Claims final, this Court regularly accepted jurisdiction (*De Groot v. United States*, 5 Wall. 419; *Végo's Case*, 21 Wall. 648; *United States v. Jones*, 119 U. S. 477).

If, as the *Williams* case holds, Article III is inapplicable to the judicial disposition of claims against the Government, the citation in that case, without disapproval, of *Hayburn's Case*, *United States v. Ferreira*, *Gordon v. United States*, and the like, is consistent with only one assumption: that the doctrine which protects the judicial power from legislative encroachment is inherent in our form of Government, and does not depend upon the source of the judicial power. Such an assumption is borne out by the decisions in *United*

*States v. Klein, James v. Appel, and Johannesen v. United States*, see pp. 26-28, 30, 32, 44, *supra*.

That Congress may ask the Court of Claims to perform non-judicial functions does not alter these conclusions. When it so functions, it is outside the judicial pale; it renders not judgments but advisory opinions; it is not subject to the appellate jurisdiction of this Court, and acts solely in an "advisory or ancillary" capacity to the legislative or executive branches (*In re Sanborn*, 148 U. S. 222, 226; *United States v. Ferreira*, 13 How. 40, 48; *Hayburn's Case*, 2 Dall. 409, 410, 413). Here, on the other hand, the Court of Claims had acted judicially under its general jurisdiction before Congress passed the Special Act under consideration. To deny effect to the executed judicial function and to require the Court of Claims to enter a contrary judgment, leaving no room for judicial discretion, is as much an interference with the judicial function as if Congress itself had entered a judgment for petitioner in the claimed amount.

That Congress lets the court enter the judgment does not make the Act less objectionable. By arrogating to itself the prerogatives of an appellate tribunal and directing the Court of Claims to perform the ministerial task of rendering a judgment in an easily ascertainable amount (cf. *Gulf Refining Co. v. United States*, 269 U. S.

125, 135-136). Congress has made "an excursion \* \* \* into the judicial function" (*Paramino Co. v. Marshall*, 309 U. S. 370, 81). It has sought to control and modify, not an advisory or administrative function of the Court of Claims, but an executed judicial function. Moreover, the doctrine of separation of powers requires not only "that the persons entrusted with power in any of these branches [the executive, the legislative, and the judicial] shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other" (*Kilbourn v. Thompson*, 103 U. S. 168, 191). Since the Constitution vests no judicial power in Congress except the power of impeachment (*Gordon v. United States*, 117 U. S. 697, 705; *Kilbourn v. Thompson*, 103 U. S. 168). It may not, because of its control over claims against the Government, usurp the functions of the court to which they are committed, and in effect assume the powers of an appellate court (*Hayburn's Case*, 2 Dall. 409; *D. Chastellux v. Fairchild*, 15 Pa. 18, 19; cf. *Taylor v. Place*, 4 R. I. 324, 337).

For these reasons, the instant case is to be distinguished from *Pocahontas Pines Assembly Hotels Co. v. United States*, 75 C. Cls. 447, in which the court was asked merely to render an advisory opinion in a matter which had already gone to judgment, and not to enter a different judgment. See p. 40, *supra*.

2. *The judicial independence of the Court of Claims is required by weighty reasons of policy*

Congress has, of course, plenary powers over expenditures of public funds, and to pay the debts of the United States (Const., Art. I, Sec. 8). Consequently, Congress would not have exceeded its powers, nor in any way detracted from the independence of the judiciary, if it had appropriated money to satisfy the claims of petitioner in full, despite the adverse judgment of the Court of Claims. Such action would be a legislative function in form and substance (cf. *James v. Appel*, 192 U. S. 129, 136). It would place the responsibility for the expenditure upon the legislative where it belongs. The judgment for the United States would still be final as to the rights of the parties, and *res judicata* of the issues and of the conclusion that the Government was not legally obligated to pay petitioner's claims in question.

But the Special Act does not appropriate funds to satisfy petitioner's claims; it orders the Court of Claims to enter a judgment adjudicating petitioner legally entitled to his claims as a matter of law. It invokes the court's judicial power, orders that it be exercised in the traditional manner and in judicial guise, but drains the court of all judicial discretion to do aught but what is directed in minute detail by Congress, thereby traducing the very judicial

power which had been invoked. That the same result could have been reached by Congress through a direct appropriation is hence of no moment. The vice in the special act is that the Court of Claims, having already disposed of a claim while acting as a court, is ordered to re-assume jurisdiction of that claim as a court, to utilize judicial procedures, and to enter a judgment, but is forbidden to engage in any of the deliberations or mental processes of a court, beyond the simple computation needed to reach the total for which Congress has directed entry of judgment. The vice is that a legislative determination that petitioner should be paid his claim is ordered to be clothed in the judicial habiliments of a judgment of a court which in the exercise of its judicial powers had reached a precisely opposite decision.

There are weighty reasons of policy for respecting the right of a court to refuse to perform such a function. A judgment of a court is normally presumed to have been rendered after a full hearing on the facts and the law; deliberation by a disinterested tribunal, and a considered conclusion usually accompanied by an explanation of its rationale. The boundaries of the dispute may be narrowed by concession or default; but an opportunity to each party to present the pros and cons for judicial consideration is an essential feature, whose denial may invalidate a judgment (*Pennock v.*

*v. Neff*, 95 U. S. 714). Payment of a judgment against the Government must await an appropriation (*Hetfield v. United States*, 78 C. Cls. 419), but the claimant is invariably assured of an appropriation, for Congress does not normally ignore an adjudicated liability of the United States. Conversely, a judgment for the United States settles any question that a legal injustice has been done by the sovereign, and furnishes a convenient means of curtailing efforts to induce payment through legislative largesse.

Legislative action, on the other hand, is not ordinarily preceded by the full inquiry characteristic of a judicial decision. A hearing may be afforded, but it is not essential to legislative action.

Although *Gordon v. United States*, 117 U. S. 697, as one of the reasons for refusal to accept appellate jurisdiction over judgments of the Court of Claims, cited the fact that execution cannot issue against the Government, the subsequent acceptance of such jurisdiction shows that the inability to issue execution was no longer considered as necessary to judicial action (*De Groot v. United States*; *United States v. Jones*, both *supra*). So also, the award of execution is not an indispensable element of a constitutional case or controversy (*Fidelity National Bank and Trust Co. v. Scrope*, 274 U. S. 123, 132, and cases there cited) and a judgment is final "when it terminates the litigation \* \* \* on the merits," and "leaves nothing to be done but to enforce by execution what has been determined" (*St. Louis, Iron Mountain & Southern R. R. Co. v. Southern Express Co.*, 108 U. S. 24, 28). A judgment on a claim against the Government is final when it establishes "the duty of the department to enforce it" though no power exists in the courts to issue formal execution to carry such judgment into effect (*Old Colony Trust Co. v. Committee of Int. Rev.*, 279 U. S. 716, 725).

Moreover, the checks imposed upon judicial and legislative action are vastly different in kind. Unwise or prodigal inroads upon the public treasury may be checked in the legislature itself or at the polls; judicial action is never subject to this kind of review. And responsibility can be evaded unless the form is respected. A private bill awarding \$10,000 to John Doe sounds very different to both legislators and the electorate from one directing the Court of Claims to hear, determine, and render judgment upon the demand of John Doe according to the usual rules of judicial procedure, except that the books of John Doe shall be deemed conclusive proof of the matters appearing therein. By assuming judicial guise, a gift to John Doe can escape both the legislative and public scrutiny generally accorded political action, with responsibility laid undeservedly at the judicial door.

If the Court of Claims is to be asked by Congress to render a decision in a proceeding apparently judicial in nature, and to clothe that decision with the dignity, finality, and weight of a judgment of the court, it is not unreasonable to require that the court be free to exercise judicial discretion as to the results to be reached and the reasons for reaching them. And where the directions prescribed by the legislature impel the court to a conclusion which it had advisedly rejected after full consideration of the facts and law, that court

should have the right to protect the dignity and finality of its judgment by declining to act.

Besides undermining the respect accorded to decisions of the Court of Claims, legislation of the character of the Special Act may subject the court to the distractions and pressures flowing from the possibility of legislative reversal of its judgments. In the words of Judge Madden (R. 54-55):

\* \* \* It is a question of whether this court, which has for some eighty years been entrusted with the responsible and dignified function of doing justice between the United States and those who bring suit against it, is going to be permitted to perform that function with the independence and single-mindedness to justice which the task deserves. It is a question of whether the judges of this court may continue to decide their cases as their consciences, and such acumen as they have, may lead them to decide, with the confidence that their decisions will be reviewed in the traditional judicial way; with both sides of the controversy presented to the reviewing tribunal; or must, on the other hand, feel that they must weigh in the scales the ability, energy, and persistence of the parties to the suit and their counsel, since they may, in a naturally completely partisan effort, obtain a hearing before a committee of Congress, at which hearing the other side of the controversy is not presented, and secure legislation setting aside the judgment of the

court and directing the court to put its indorsement upon the judgment of members of another branch of the Government.

The fact that the Court of Claims exercises a specialized jurisdiction in the field of claims against the sovereign buttresses rather than detracts from the applicability of these considerations. With a court determining claims of citizens against their Government aggregating hundreds of millions of dollars every year, it is as essential as it is with courts of general jurisdiction that the litigant should respect the court's decisions and judgments; that he should regard them as the result of a disinterested and deliberative judicial process; and that he should expect equality of treatment regardless of political prestige or power. These considerations are peculiarly pertinent at this time, when the cessation of hostilities will usher in a tremendous number of claims based upon termination of wartime contracts, claims of veterans and the like.

This Court's unquestioned appellate power over the judgments of the Court of Claims, rendered in the exercise of its judicial power under general or special acts, presents a conceptual as well as a practical obstacle to any other result than that reached below. This Court may accept appellate jurisdiction only if the judgments of the Court of Claims are final and not subject to revision by the legislative or executive (*Gordon v. United States*,

2 Wall. 561, 117 U. S. 697; *United States v. Jones*, 119 U. S. 477; *Muskraat v. United States*, 219 U. S. 346). The Special Act is as fully a legislative revision of the judgment rendered by the Court of Claims in 1933 as if it had been authorized in the statute under which the court assumed jurisdiction. Since the cited decisions make it plain that the likelihood of revision, and not its actual exercise, precludes the appellate jurisdiction of this Court, the recognition by this Court of a power in Congress to review and revise judgments of the Court of Claims may be tantamount to a relinquishment of its own appellate jurisdiction over that court. For if Congress has at all times such reserve power to review, it would seem to be immaterial whether or not it is exercised in a particular case; the decision of the Court of Claims can never be deemed final and therefore never reviewable by this Court, because the legislature might at any time decide to change it (as it has done here 9 years afterwards). It would seem equally immaterial that Congress has not announced in advance its intention to review.

To pursue this argument further, suppose this Court had found in the first *Pope* decision (76 C. Cls. 64) an important principle warranting review, had granted rather than denied certiorari, and had affirmed the Court of Claims' judgment. Could Congress then have enacted the Special Act setting aside that judgment and directing entry of

a contrary decision despite the mandate of this Court? If not, then a judgment of the Court of Claims will be final, and thus judicial, not when it is rendered, but only when it is affirmed by this Court. This Court, however, can only review a judgment which is final when presented, rendered in the exercise of judicial power. And if this Court had granted the writ and affirmed, the Special Act would have the same effect as it has now; it would still nullify a judicial decision and dictate an opposite result, encroaching upon the judicial power of two courts rather than one. In view of the fact that denial of certiorari leaves the judgment as final as if the upper court had affirmed (*United States v. O'Grady*, 22 Wall. 641, 648), the interference in this case seems no less direct.

We suggest that the dilemma is resolved by resort to the doctrine of separation of powers. Congress need not submit the United States to suit in the courts, and may at any time withdraw a class of claims or a particular claim from the jurisdiction of the Court of Claims or of this Court (*In re Hall*, 167 U. S. 38; *District of Columbia v. Eshin*, 183 U. S. 62). But if it sees fit to commit a claim to the judiciary and if judicial power is finally exercised in regard thereto, we submit that Congress may no longer review or interfere with that exercise of judicial power (cf. Rutledge J., concurring in *Schneiderman v.*

*United States*, 320 U. S. 118, 165, 168). Although Congressional control of litigation against the Government is necessarily great, *United States v. Klein* demonstrates that there are limits to the ability of Congress to dictate to the judiciary the determination to be made of such claims when submitted to the judiciary. These limits are the product of the tripartite distribution of governmental powers under the Constitution, which requires that each department be independent of the others, so "that the acts of each shall never be controlled by, or subjected directly or indirectly, to, the coercive influence of either of the other departments" (*O'Donoghue v. United States*, 289 U. S. 516, 530). We submit that the court below correctly held that those limits were exceeded in this case.

#### B. THE COURT OF CLAIMS EXERCISES "JUDICIAL POWER OF THE UNITED STATES" AS DEFINED BY ARTICLE III OF THE CONSTITUTION

We have argued that judicial power, irrespective of its source, is entitled to protection against encroachment and interference by the legislative, and that Congress has vested the Court of Claims with judicial power, which it exercised in determining these claims in 1933. But if the doctrine of separation of powers, and the limitation which it imposes upon legislative interference with judicial functions, applies only to judicial power derived from Article III, it will be necessary to determine

whether the power of the Court of Claims is derived from that Article. In that case we suggest that the power exercised by the Court of Claims when adjudicating cases against the Government is a part of the "judicial power of the United States" defined by Article III. For that Article extends the judicial power "to Controversies to which the United States shall be a party." The only authority which precludes giving this provision of the Constitution its normal and literal meaning is *Williams v. United States*, 289 U. S. 553, a decision which does not accord with prior authority or with constitutional history, which is based upon a mistaken premise, and which was rendered without the aid of considerable relevant historical material. It is respectfully urged that, if the source of judicial power of the Court of Claims be regarded as material to decision in this case, the Court reestablish the principles implicit in its earlier decisions and recognize Article III to be applicable whenever the determination of controversies respecting claims against the United States is entrusted to the courts.

### 1. *The Early Authorities*

Less than three years after the Constitution became effective, all but one of the justices of this Court, in their capacity as judges of the Federal circuit courts, considered the validity of a statute authorizing those courts to examine cer-

tain pension claims against the Government by invalid veterans, to determine a just allowance for pension arrearages, to ascertain the degree of disability and "to transmit the result of their inquiry. \* \* \* to the Secretary at War, together with their opinion in writing," as to the proportion of monthly pay which would be equivalent to the ascertained degree of disability (Act of March 23, 1792, 1 Stat. 243, § 2). The Secretary at War was then authorized to place the applicant's name on the pension list, unless he suspected imposition or mistake, in which event he could withhold the name from the list and report it to Congress (*id.* § 4). Acting in behalf of Hayburn, a pension applicant, the Attorney General sought a writ of mandamus from the Supreme Court to require the circuit court for the district of Pennsylvania to act under this statute. Before the Supreme Court could decide the motion, the statute was repealed (Act of February 28, 1793, 1 Stat. 324).

However, the circuit courts for the districts of New York, Pennsylvania and North Carolina, containing five of the six members of the Supreme Court (Chief Justice Jay and Justices Cushing, Wilson, Blair, and Iredell) had previously expressed the opinion that the statute was invalid (*Hayburn's Case*, 2 Dall. 409). All agreed that the act sought to vest non-judicial power in the courts since their decisions were made subject to revision

by the executive and the legislature. But, significantly, all three opinions assumed that Article III applies when the determination of claims against the Government is entrusted to the judiciary, and that before jurisdiction of controversies in regard thereto can be taken by the courts, both the procedure and the tribunal must meet the requirements of the judicial article. Thus, the Circuit Court for North Carolina declared that the Secretary at War, who was vested by the act with a power of review over the circuit courts, was incapable of acting as an appellate tribunal in respect to such claims, because such a tribunal "must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary at War is not held" (2 Dall. at 412). The opinions of the other two circuit courts make the same assumption (2 Dall. at 410, 411). Since the justices and judges joining in these opinions included men who had been prominent in the drafting of the Constitution, their interpretation of that document less than three years after it became effective an important contemporary guide to its meaning.

*United States v. Ferreira*, 13 How. 40 (1851), is a similar case, involving a special act of Congress authorizing the United States District Judge in Florida to receive and adjudicate claims of certain named persons for damages due to the opera-

tions of the American Army in Florida. The judge's decision, with the evidence on which it was founded, was to be reported to the Secretary of the Treasury, who was directed to pay the same "on being satisfied that the same is just and equitable" (3 Stat. 768; 6 *id.* 569; 9 *id.* 788). This Court held that it had no jurisdiction of an appeal from a decision by the District Judge on such claims. The ground for the decision, set forth in an opinion of Chief Justice Taney, was that since the judge's decision was not final until approved by the Secretary of the Treasury, the power to decide the claims was not conferred "as a judicial function \* \* \* in the sense in which judicial power is granted by the Constitution to the courts of the United States" (13 How. at 46-48). The Chief Justice observed that the special act merely conferred authority upon the judge as "a commissioner to adjust certain claims against the United States" (13 How. at 47).

The rationale in both these cases is the same: What prevented the jurisdiction exercised by the inferior courts from being judicial power of the United States was not the fact that the subject-matter consisted of a claim against the United States, but the revisory power in the legislative or executive. That was made explicit in two cases dealing with the power of the Supreme Court to review the decisions of the Court of Claims: *Gordon v. United States*, 2 Wall. 561, which held

that the revisory power over the Court of Claims vested in the Secretary of the Treasury precluded review of that court's judgments by this Court; and *United States v. Jones*, 119 U. S. 477, which upheld the exercise of such appellate power after the revisory procedure was eliminated.

The view that claims against the Government can be adjudicated under Article III was apparently shared by the Congress which established the Court of Claims, as believing that it would constitute an inferior court of the United States exercising judicial power under Article III of the Constitution.

## 2. *Congress Intended the Court of Claims to be a Constitutional Court*

The Supreme Court has declared that whether a court is a constitutional or legislative court is determined by the power under which it was created and the jurisdiction it exercises; and that the intention of Congress in creating the court is immaterial. *Ex Parte Bakelite*, 279 U. S. 438, 459, 460. We respectfully suggest that the legislative objective is not without relevance. Since Congress can create "inferior courts" under Article III and vest them with some or all of the "judicial power of the United States" under Article III, and since Congress can also create legislative courts under Article I and vest them with judicial power reviewable or exercisable by constitutional courts, it may well be of legal interest

just which powers Congress intended to invoke and bestow.

The legislative materials relating to the Court of Claims show without doubt the congressional intention that it should be a court in fact, as well as in name, exercising judicial power with all its prerogatives; that it should be "an inferior court" such as the federal district courts; and that it should exercise "judicial power" under Article III. It also shows the intention of Congress to have controversies respecting claims against the United States determined "judicially" rather than legislatively, an intention which becomes clearer with each successive act dealing with the Court of Claims.

#### (a) THE FIRST COURT OF CLAIMS

The middle of the nineteenth century saw mounting dissatisfaction with the treatment accorded claims against the United States. These were heard and passed on individually by Congress and disposed of by special act. The pressure of business resulted in many claims being neglected, while those accorded satisfaction obtained it more often through influence than merit.

In 1854, Senator Brodhead, of Pennsylvania, introduced a bill to establish a board of three commissioners to examine and settle claims against the United States, explaining that the proposed board would be "in the nature of a judicial tribunal" with power to take testimony on behalf

of the Government, but its decisions would not be final (Cong. Globe, 33d Cong., 2d Sess., p. 71).<sup>25</sup> The bill was reported by the Committee on Claims, (*id.* p. 70), but the discussions in the Senate indicated that a tribunal of greater dignity than that proposed by Senator Brodhead was desired. While agreeing that the decisions of such tribunal should not be final, Senator Hunter thought their sessions and opinions should be made public, records should be kept, and the judges should be appointed for life without power of removal in the President. (*Id.* p. 71.) Senator Clayton agreed that the new tribunal should be a court, saying (*id.* p. 72):

These commissioners ought to be independent. If they are not judges nominally, they are so in fact, and ought to have that best of all qualities pertaining to a judge—perfect independence. I think it was in the convention of Virginia that John Marshall said, that of all the evils that could be inflicted upon a sinning people by an angry Heaven, a dependent judiciary was the worst. This is a court; call it what you please. I wish it to be substantially a court. I do not care for the name, whether you term them commissioners or judges; but I

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<sup>25</sup> Senator Brodhead expressed doubt whether Congress had the power under the Constitution to waive sovereignty and to authorize suit either in "law or equity," and stated that the bill represented a compromise between enlarging the powers of the executive officers and enlarging those of the judiciary (*id.* p. 70).

wish them to be independent. Now, my friend has provided in the bill that these commissioners shall be appointed by the President, by and with the advice and consent of the Senate; and "shall hold their office until the time appointed for the expiration of this act, unless sooner removed by the President." I trust the words, "unless sooner removed by the President," will be stricken from the bill. ~~\*\*\*~~ I do not wish the President himself, whoever he may be, to be liable, as he will be, constantly, to the imputation of controlling and governing the decisions of this tribunal. For the sake of the President, for the sake of the character of the tribunal, for the sake of perfect justice, I ask that the tribunal may be in fact perfectly independent.

Senator Pettit urged that claims be referred to the district courts and tried in the same manner as suits between private individuals, accurately prophesying that the establishment of a tribunal without power to enter final judgment would not relieve the pressure on Congress (*id.* pp. 72-73).

The matter was referred back to a select committee, which reported a bill differing in several important particulars from the first. In place of a board of three commissioners to hold office at the pleasure of the President, the amended bill provided for a "Court of Claims" of three judges holding office during good behavior. Its sessions were to be public and its records kept. It was given the same subpoena power as the Federal

courts (a power not given the board). However, the decisions of the court, like those of the board, were to be advisory only, and were to be reported to Congress together with the facts found and the testimony taken. Where the decision was favorable to the claimants, a bill designed to effectuate the decision was to accompany the report (*id.* pp. 105-106).

Senator Weller then proposed an amendment to call the tribunal a "board of commissioners" instead of a "court," so that tenure could be provided for a fixed period rather than during good behavior. He gave the following reasons for the proposed amendment (*id.* p. 107):

Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior. The only power which is given to us on that subject is by the first section of the third article of the Constitution of the United States, which provides that "the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior." In order to avoid the difficulty which is presented to my mind, I am compelled to move to change the character of this tribunal from a court to that of a board of commissioners; and I apprehend that then, under the provisions of the Constitution, it would be perfectly competent for the lawmaking power of this Government to limit the period for which the commis-

sioners should hold their offices. It may well be doubted whether this bill creates a "court" within the meaning of the provision of the Constitution to which I have referred; but, to avoid all controversies which might arise on this subject, I deem it proper to move the amendment.

The proposal provoked a good deal of discussion, eliciting a variety of opinions as to the character of the tribunal being created. Senator Hunter, a member of the special committee, opposed the amendment, stating that it was of the greatest importance that the members of the court enjoy tenure during good behavior and be as independent of the appointing power "as the Constitution has made the judges of the United States," in order that the action of the court should be "sound, just, pure and impartial" (*id.* pp. 108-109).

Senator Pratt expressed the opinion that regardless of what the tribunal was called, it was exercising judicial power and consequently the Constitution required its judges to have tenure during good behavior. Senator Weller, the proponent of the amendment under discussion, disagreed on the ground that the court was merely "a court of inquiry—a mere tribunal to take testimony for the final action of Congress"—<sup>26</sup> (*id.* p. 110).

<sup>26</sup> "The Congress of the United States undoubtedly has power to appoint commissioners; and what is the provision of this bill but the organization of a board of commissioners

Senator Clayton, another member of the committee, agreed with Senator Pratt, pointing out that the judicial power as defined by the Constitution expressly extended to claims against the United States and that the spirit as well as the letter of the Constitution required that those passing upon such claims should be judges and should be "as independent as any other judges existing under the government" (*id.* p. 111).

Senator Chase, whose views are particularly interesting because he was a member of the Supreme Court which decided *Gordon v. United States*, 2 Wall. 561, said (*id.* p. 112):

I cannot regard this delegation of power to these officers as a delegation, in any sense of judicial authority—judicial authority, I mean, as prescribed in the Constitution of the United States. Judicial authority implies power to determine finally upon cases submitted to it. No tribunal can be a court in the proper sense of the word, unless it has the power to determine the law in regard to the particular controversies submitted to it. There may be an appeal from it, but if not appealed from, its judgment is final.

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to ascertain \* \* \* the facts connected with claims against this Government. There is not a word in the bill which makes the opinion of these judges the judgment of a court. \* \* \* It is to be a mere tribunal organized for the purpose of ascertaining facts and taking testimony, and submitting that testimony to the legislative branch of the Government, where the case can finally be disposed of" (*id.* p. 110).

Senators Stuart and Douglas stated their belief (*id.* p. 113) that the bill proposed to establish—

a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office. I also think that a mere change of the word “judges” to “commissioners” would not change the effect of the bill. I admit that a bill might be framed establishing a commission which would not be a judicial tribunal within the meaning of the Constitution; but I am of the impression that the bill now before us, though the word “judges” should be changed to “commissioners,” would still constitute a judicial tribunal within the meaning of the Constitution, and therefore that the tenure of office is fixed by it.

With this diversity of opinion before it, the Senate voted upon and rejected the proposed amendment, 24 to 16, thus sustaining the position of those who wished the new tribunal to be a “court” (*id.* p. 114).

It should be noted that at the time of these debates (1855), Chief Justice Marshall’s decision in *American Insurance Co. v. Canter*, 1 Pet. 511, was already 27 years old, so that the concept of a “legislative court” exercising judicial power derived from Article I of the Constitution (such as a territorial court) must have been well known to the Senators who discussed the merits of the bill—men obviously learned in the law. It is

significant that their discussion posed the alternatives of a constitutional court or a board of commissioners; not a constitutional court or a legislative court. And it was uniformly assumed that if the Court of Claims were to be established as a court, it would be an inferior court under Article III.

The House of Representatives passed the bill as approved by the Senate, and it became law on February 24, 1855 (10 Stat. 612).

#### (b) FINALITY OF JUDGMENTS

It soon became apparent, however, that the lack of finality of the decisions of the Court of Claims defeated its objective. Matters considered by the court were reviewed by Congress in the same detail and with as little expedition as matters in which that tribunal had not acted. Consequently, claimants were loath to invoke the services of that court, and the backlog of unconsidered claims grew in both Houses of Congress. Under these circumstances, President Lincoln urged Congress to empower the court to render final judgments, saying:

It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself, in

favor of citizens, as it is to administer the same between private individuals. *The investigation and adjudication of claims, in their nature belong to the judicial department*; besides, it is apparent that the attention of Congress will be more than usually engaged, for some time to come, with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final.

Fully aware of the delicacy, not to say the danger, of the subject, I commend to your careful consideration whether this power of making judgments final may not properly be given to the court, reserving the right of appeal on questions of law to the Supreme Court, with such other provisions as experience may have shown to be necessary (Cong. Globe, Dec. 3, 1861, p. 2, Appendix; 37th Cong., 2d Sess.). [Italics supplied.]

So prompted, Congress passed a bill which was intended to make the judgments of the court final, and which also provided for appeals to the Supreme Court. (12 Stat. 765). Senator Hale, who had bitterly opposed giving finality to the judgments of the Court of Claims, proposed an

amendment that no money be paid out of the Treasury for any claim passed upon by the court until an appropriation had been estimated therefor by the Secretary of the Treasury. The amendment was accepted without discussion (Cong. Globe, 39th Cong., 1st Sess., part 1, p. 770).<sup>27</sup>

Because of this amendment, the Supreme Court in *Gordon v. United States*, 2 Wall. 561, dismissed an appeal from a judgment of the Court of Claims for want of jurisdiction. According to the opinion prepared for the Court by Mr. Chief Justice Taney (117 U. S. 697, 698-699),<sup>28</sup> the basis of the decision was under the statute (Act of March 3, 1863, § 14)—

Neither the Court of Claims nor the Supreme Court can do anything more than certify their opinion to the Secretary of the Treasury, and it depends upon him, in the first place, to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant, it will then rest with Congress to determine whether they will or will not make an appropriation for its payment. Neither court can by any process enforce its judgment; and whether it is paid or not, does not depend on the decision of either court, but

<sup>27</sup> The amendment had reference to the practice current at the time of having the Secretary of the Treasury estimate at the beginning of the fiscal year the amount necessary to pay claims against the United States for the purpose of having Congress appropriate the necessary moneys therefor.

<sup>28</sup> See p. 45, n. 21, *supra*.

upon the future action of the Secretary of the Treasury, and of Congress.

Since the judgments of the Court of Claims and of the Supreme Court would not be final and conclusive upon the rights of the parties, the Chief Justice held that the power which the Court of Claims was exercising and which the Supreme Court was being asked to exercise was not judicial in character; that as a consequence of the power given the Secretary of the Treasury to review the decisions of the Court of Claims, that court was acting as a "Commissioner or Auditor;" hence, appellate jurisdiction could not be accepted because (117 U. S. at 704):

this Court has no appellate power over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

Despite the language in the opinion relating to execution against the Government, the real objection to the acceptance of appellate jurisdiction by this Court was the power of review given the Secretary of the Treasury by the Act of March 3, 1863. After this decision, the objectionable section was immediately repealed in order to remove the obstacle to the exercise of appellate

jurisdiction by the Supreme Court (14 Stat. 9; Cong. Globe, 39th Cong., 1st Sess., part 1, p. 770). The Supreme Court then took appeals without question from the judgments of the Court of Claims (*De Groot v. United States*, 5 Wall. 419; *United States v. Jones*, 119 U. S. 477). The previous refusal to accept jurisdiction was explained as based upon the power of the Secretary of the Treasury to examine and revise the judgments of the Court of Claims; so that the removal of that power made the judgments final (*United States v. O'Grady*, 22 Wall. 641, 647; *United States v. Jones*, 119 U. S. 477, 478-479).<sup>29</sup>

Thus, insofar as Congress has been able, it has made the determination of claims against the Government a matter for the judiciary, and has made the Court of Claims a judicial as distinguished from a legislative tribunal. And, insofar as Congress has power to do it, it has sought to make the Court of Claims a constitutional court and to

<sup>29</sup> In 1883, to relieve the press of business in Congress, a bill was introduced to enlarge the jurisdiction of the Court of Claims. The report which accompanied the bill (later enacted as the Tucker Act, 24 Stat. 505, 28 U. S. C. 250) points out that the history of the courts demonstrates the advantages of having a court of justice ascertain rights as between litigants, and proposes that the jurisdiction of the court be extended to include certain claims which "should be asserted before a judicial and not a legislative tribunal." It adds that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." (H. Rep. 1077, 49th Cong., 1st sess., pp. 4, 5.)

make it free from the control of any other branch of the Government.

### 3. *This Court, Until 1928, Assumed That the Court of Claims Was an Article III Court*

The acceptance of appeals from the Court of Claims, viewed in the light of Chief Justice Taney's opinion in the *Gordon* case, shows an assumption that "the judicial power of the United States" under Article III extended to the determination of claims against the Government, and that the Court of Claims, which after 1866 was exercising such judicial power, was no longer the "auditor or controller" described in the *Gordon* case, but was an "inferior court" from which alone an appeal to the Supreme Court would lie, according to the *Gordon* opinion (117 U. S. at 704).

Again in *United States v. Klein*, 13 Wall. 128, this Court invalidated a statute imposing a rule of decision upon this Court when hearing appeals from the Court of Claims. By placing its decision on the ground of an attempted legislative encroachment upon the judicial power vested in the Supreme Court by Article III, this Court clearly indicated that it considered its appellate jurisdiction over the Court of Claims to be within the ambit of the judicial article.

Any doubt that Article III was uniformly assumed to be the source of the judicial power

exercised in determining claims against the United States, was removed by the fairly recent use made by this Court of *Hayburn's Case*, *United States v. Ferreira*, and *Gordon v. United States*. These decisions were invariably cited as judicial interpretations of the content of the "judicial power of the United States" vested in the inferior courts by Article III, and are the standard authorities for the principle that such courts may not take jurisdiction unless there is presented a "case" or "controversy" within the meaning of Article III, Section 2. See *Tutun v. United States*, 270 U. S. 568 (1926); *Willing v. Chicago Auditorium Ass'n*, 277 U. S. 274 (1928). Unless claims against the United States are covered by Article III, the older cases involving such claims would have been inapposite.

It was likewise uniformly believed that courts which exercised judicial power under Article III, Section 2, were "inferior courts" under Section 1 of that Article. Such was the assumption in *Hayburn's Case*. More expressly, this Court in *United States v. Union Pacific R. R.*, 98 U. S. 569, 602-603, referred to the Court of Claims as an "inferior court" created under Article III, like the district and circuit courts, and exercising judicial power of the United States. Like statements appear in later cases. See *United States v. Louisiana*, 123 U. S. 32, 35; *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 386; *Kansas v.*

*United States*, 204 U. S. 331, 342. In 1924 this Court confirmed that view of the Court of Claims by holding that Article III, Section 1, prevents the imposition of a Federal income tax upon the compensation of a judge of that court (*Miles v. Graham*, 268 U. S. 501, 506, 509).

#### 4. *Ex parte Bakelite* (1929)

In 1929, however, it was suggested for the first time that Article III was not the source of the judicial power exercised by the Court of Claims. *Ex parte Bakelite*, 279 U. S. 438, decided that year, held that the Court of Customs Appeals is a "legislative court" created by Congress under Article I and not Article III, and therefore that the court could take jurisdiction of an appeal from a Tariff Commission proceeding, even though, being simply advisory to the President, such proceeding may not have been a "case or controversy" under Article III, Section 2. In reaching that conclusion, this Court included in the category of legislative courts not only the territorial courts and those for the District of Columbia, created pursuant to the plenary power over these areas vested in Congress by Article IV, Section 3 and Article I, Section 8, but also a class of "special tribunals" created by Congress "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial deter-

mination and yet are susceptible of it." In this category the Court placed the Court of Claims (279 U. S. at 452):

Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is ~~one which Congress has a discretion either to exercise directly or to delegate to other agencies.~~

Disapproving the dictum in the *Union Pacific* case, and the obvious basis for the holding in *Miles v. Graham* (thus foreshadowing the decision in the *Williams* case), the Court stated that the Court

of Claims, "like the courts of the District of Columbia," is not a constitutional court (279 U. S., at 455), and declared that the judicial power exercised by the Court of Claims is "prescribed by Congress independently of Section 2 of Article III" (p. 449). The Court observed that "Congress always has treated" the Court of Claims as having the status of a legislative court (p. 454), a statement which does not square with the legislative history of the statutes creating the Court of Claims (see pp. 66-78, *supra*).

As authority for the proposition that Article III judicial power does not extend to the judicial determination of "various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it," the *Bakelite* case cited a number of decisions (279 U. S. at 451, n. 8).<sup>30</sup> But such of these cases as involve judicial action seem to assume the contrary; for wherever the question was raised, the Court assumed that the conditions placed by Article III upon the exercise of judicial power, including the existence of a "case of controversy," had to be met (*Fong Yue Ting v. United States*, 149 U. S. 698, 708; *Gordon v. United States*, 147 U. S. 697, 702; *La Abra Silver*

<sup>30</sup> This category is derived from language in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284, which, however, did not involve the question of whether a court dealing with such matters would be a constitutional court.

*Mining Co. v. United States*, 175 U. S. 423, 455). No attempt was made in the *Bakelite* opinion to reconcile its holding with these decisions, which assumed the applicability of Article III, Section 2 to matters submitted to the courts which did not require judicial determination.<sup>31</sup>

To support its characterization of the Court of Claims as a legislative court, the *Bakelite* opinion cited the *Gordon* case, which held judgments of the Court of Claims unappealable when subject to revision by the Secretary of the Treasury, and *In re Sanborn*, 148 U. S. 222, which held that an appeal to this Court does not lie from an advisory opinion rendered by the Court of Claims to the Secretary of the Interior. But the *Gordon* case was followed by an amendment eliminating executive review of the judgments of the Court of Claims, and subsequently the judgments of that court were reviewed by this Court, presumably as decisions of an inferior court created under Article III (*United States v. Jones*, 119 U. S. 477). Chief Justice Taney's description of the court, written when its decisions were subject to executive review, therefore became inapplicable after 1866 when its judgments were made final.

<sup>31</sup> Since the cases so holding were cited and not disapproved (279 U. S., at 451), the only possible conclusion is that the Court in the *Bakelite* case thought the "judicial power" referred to in Section 1 of Article III and that referred to in Section 2 thereof were not coterminous. Such a dichotomy does not comport with reason or with any other decision.

And although *In re Sanborn*, 148 U. S. 222, approved inferentially at least, the performance by the Court of Claims of a function characterized as "ancillary and advisory only"—that of reporting its findings and opinion on a claim referred to it by the Department of the Interior<sup>32</sup>—it is a legal anachronism to explain this as the designation of the Court of Claims as a legislative court. For the notion that a legislative court may exercise nonjudicial powers had not then been enunciated.<sup>33</sup> A more probable explanation of *In re Sanborn* is that, like *Wallace v. Adams*, 204 U. S. 415, it considered *Gordon v. United States* to prohibit only the Supreme Court, the sole court expressly provided for in the Constitution, from exercising nonju-

<sup>32</sup> The description of the court's function as "ancillary and advisory only" was carefully restricted to "such a case," i. e., an advisory opinion without final judgment (148 U. S. at 226).

<sup>33</sup> It was first suggested in *Postum Cereal Co. v. Calif. Fig. Nut Co.*, 272 U. S. 693, that the power of Congress to require the courts of the District of Columbia to perform administrative functions was the product of the fact that such courts were legislative and not constitutional courts. In *Ex parte Bakelite*, this Court, relying upon the cases involving the courts of the District of Columbia and *In re Sanborn*, held that only legislative courts can be asked to perform non-judicial functions. Since the the courts of the District of Columbia are now recognized to be constitutional courts but may still exercise non-judicial functions, it is clear that the power of Congress to confer upon them non-judicial functions stems from the dual power over the District and not from their character as legislative courts. *O'Donoghue v. United States*, 289 U. S. 516.

dicial functions. Cf. *Harrison v. Moncravie*, 264 Fed. 776 (C. C. A. 8).

Thus, the previous decisions of this Court furnish no support for the conclusion reached in *Ex parte Bakelite*, and subsequently adopted in *Williams v. United States*, 289 U. S. 553, that the Court of Claims, because it handles matters susceptible of judicial determination but not requiring it, is not created pursuant to Article III of the Constitution. And no reason, grounded in policy or logic, is advanced for that view.<sup>34</sup> The fact that a court's business consists exclusively of matters which need not have been submitted for judicial determination would seem to be irrelevant in determining the nature of the power exercised by the court. Courts specializing in a particular type of jurisdiction are not unknown.<sup>35</sup> Moreover,

<sup>34</sup>The opinion in *Ex parte Bakelite* indicates that the power involved in determining claims against the Government is not included within Article III (279 U. S. at 449). But the Court simultaneously declares that constitutional courts "established under . . . section 2 of Article III" "can be invested with no other jurisdiction" than the "judicial power defined in that section" (279 U. S. at 449). These two propositions, if accurate, mean that this Court and the district courts, which are unquestionably constitutional courts, have no power to pass upon claims against the United States and that the statutes vesting in the former appellate jurisdiction and in the latter a concurrent original jurisdiction as a "court of claims" (*United States v. Sherwood*, 312 U. S. 584), are invalid.

<sup>35</sup>For example, the Emergency Court of Appeals acts only in review of orders of the Office of Price Administration (see § 204 (d), Emergency Price Control Act of 1942, as amended,

various matters have been submitted to constitutional courts although they could also have been determined nonjudicially, as the *Bakelite* opinion recognized. See 279 U. S., at 451, n. 8.

### 5. *The Williams Case*

*Ex parte Bakelite* (1929) prepared the way for the decision in *Williams v. United States*, 289 U. S. 553 (1933). The latter case held that the determination of claims against the United States lies outside Article III because such claims do not require judicial treatment and because Article III, Section 2, defining the judicial power of the United States, does not extend to suits against the United States; that the judicial power exercised by the Court of Claims is derived from Congress' power to pay debts under Article I, Section 8; that the court is therefore not a constitutional court; and that as a result the compensation of its judges is not protected by the prohibition against congressional diminution in Article III, Section 1. The decision is bottomed principally upon the notion that the phrase in Article III, Section 2 "controversies to which the United States shall be a party" could not have been intended by its fram-

56 Stat. 31; 50 U. S. C. (Supp. II) 924 (d)). And until 1913 the Commerce Court (Act of June 18, 1910, 36 Stat. 539), composed of five circuit judges, designated from time to time for temporary service in the court, sat exclusively in cases involving orders of the Interstate Commerce Commission—cases now heard by a district court. Urgent Deficiencies Appropriation Act of October 22, 1913, c. 32, 38 Stat. 219.

ers to include cases in which the United States is party defendant because of the known sovereign immunity from suit (289 U. S., at 573). That notion, we respectfully suggest, is the product of a faulty analysis and the failure of the Court to have the pertinent constitutional history before it.

Article III, Section 2, unqualifiedly provides that the judicial power shall extend to "Controversies to which the United States shall be a Party," and, as the *Williams* case admits, this literally covers suits both by and against the United States (289 U. S., at 573). On several occasions in the past the Court has declared that this clause in Article III should be construed to mean what it says. In *Minnesota v. Hitchcock*, 185 U. S. 373, 384, 386, the Court said:

This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the

judicial power of the United States extends to such a controversy.

See also *Kansas v. United States*, 204 U. S. 331, 342.

These statements were overruled in the *Williams* case on the ground that to construe Article III, Section 2, as including controversies to which the United States was a party defendant would be inconsistent with the principle that the government could not be sued without its consent. The flaw in this reasoning is the failure to distinguish the bestowal of judicial power from the waiver of sovereign immunity. From the premise that the above phrase in Article III was not intended as blanket consent by the sovereign to be sued, the Court concluded that this prevented application of the provision even where consent had been given by Congress. But like the other categories of controversies enumerated in Section 2 of Article III this particular ground of jurisdiction does not dispense with other prerequisites to the valid exercise of judicial power. For example, the judicial power extends to suits between citizens of different states, but this does not automatically confer jurisdiction. Congress must create an inferior court to exercise such jurisdiction, and the defendant must be brought into court by service of process, by consent to suit through filing of an appearance, or by other accepted judicial technique. If a defendant is without the jurisdiction, he may often be sued only

if he consents to jurisdiction. Similarly, when jurisdiction is invoked of a suit to which the United States is a party, the requirement as to obtaining personal jurisdiction over the defendant must still be observed, which means that the sovereign must consent to be sued. Once the question of personal jurisdiction or capacity is separated from that of the general jurisdiction of the court over the subject matter, it becomes plain that Mr. Justice Sutherland's correct premise that Article III, Section 2, was not a consent by the United States to be sued, does not lead to his conclusion that Article III, Section 2, excludes from the constitutional jurisdiction of the inferior courts "controversies to which the United States shall be a party" as a defendant.<sup>36</sup>

For his conclusion that the framers were using "party" only in the sense of "plaintiff," Mr. Justice Sutherland relied upon three historical circumstances: (1) The doctrine of sovereign immunity from suit was well known at the time of the framing of the Constitution; (2) subsequent to the Convention, Marshall, Madison, and Hamilton expressed the view that Article III did not

<sup>36</sup> The *Williams* case also characterized as "peculiarly suggestive" "the omission to qualify 'controversies' by the word 'all,' as in some other instances" (289 U. S. at 553, 573). We have been able to discover no intimation whatsoever in historical material to support this view, and it does not bear analysis. The category of "suits between citizens of different states" is similarly unqualified, but its comprehensiveness can hardly be questioned.

affect the immunity of individual states from suit; and (3) with respect to suits involving the United States, the Judiciary Act of 1789 conferred jurisdiction upon the circuit courts only "where \* \* \* the United States are plaintiffs or petitioners \* \* \*." Analysis of these factors reveals that none supports the conclusion reached.

#### (a) WAIVER OF SOVEREIGN IMMUNITY

While the doctrine of sovereign immunity was a "settled and well understood rule" at the time of the framing of the Constitution, it was also well known, both in England and in a number of the original states, that the sovereign could and often did waive immunity and consent to be sued.

(1) In England, the waiver of immunity became known as early as the thirteenth century when the Petition of Right first evolved. This remedy was used for almost 400 years, and consisted of a petition to the Crown setting up the claim of legal right, which, after being endorsed "let right be done," was followed by a Commission issued out of Chancery to find the facts, an answer by the Crown to the petitioner's plea, and a trial on the issue in the King's Bench on the common-law side of the Chancery. As the centuries passed, this remedy against the Crown gave way to more expeditious procedures, and extended powers of relief against the Crown by judicial proceedings became

available to the subject in several courts created during the reign of Henry VIII<sup>th</sup> (the Courts of Augmentations, Wards, and Surveyors), subsequently merged into the Court of Exchequer. And while there appear to be no reported cases based upon the petition of right between 1615 and 1800, several new remedies emerged. The English experience is summarized in greater detail in Appendix B, *infra*, pp. 115-123.

In 1668, it was first clearly recognized that a subject was entitled to equitable relief against the Crown in the Court of Exchequer (*Paulett v. Attorney General*, Hardres, 465). Rejecting the Crown's contention that the plaintiff's relief was solely by a petition of right, Chief Baron Hale granted relief to a mortgagor upon a bill against the Attorney General to redeem mortgaged lands seized by the King after the mortgagee's heir had been attainted of treason. And in the next century the jurisdiction of the Court of Exchequer to give equitable relief against the Crown was still recognized: *Haere v. Attorney General* (1741), 2 Atkyns 223; *Burgess v. Wheate*, 1 Eden. \*225-256; Bl. Com. iii: 428-429. (See Appendix B, pp. 121-123, *infra*.) Thus, waiver of sovereign immunity and consequent jurisdiction

Where the relief sought from the Crown was payment of a sum due, a petition to the Barons of the Exchequer was held to lie, although petition of right was also available. *The Bankers' Case*, 14 S. T. 1 (House of Lords, 1690-1700).

in the courts to entertain judicial proceedings and grant judgments against the Crown was known in England for many centuries before the adoption of the Federal Constitution. In the eighteenth century, the already well-established rule that redress against the Crown could be secured through judicial proceedings must have been known to lawyers in the American colonies.

(2) The waiver of immunity was also known in this country both during and after the Revolution, and the courts of several of the original States were often entrusted with the adjudication of claims against the State. Broad statutory waivers of immunity were adopted in Maryland and Virginia, while a more restricted practice prevailed in Delaware, Connecticut, North Carolina, Georgia, and New Jersey. See Appendix B, *infra*, pp. 123-130. Thus in Virginia, an Act of 1778 authorized suit in "the high court of chancery or the general court" upon any alleged right in law or equity "against the commonwealth," and the Supreme Court of the State observed that "there never has been a moment since October 1778 that all persons have not enjoyed this right by express statute" to sue the Commonwealth of Virginia. See *Higginbotham's Ex'r. v. Commonwealth*, 66 Va. 627, 637 (1874). Shortly after the Constitution was adopted, the Court of Appeals of Virginia upheld a judgment against the State for the value of an impressed vessel, upon

a statutory reference of the claim to the judiciary after it had been administratively denied (*Commonwealth v. Cunningham & Co.*, 8 Va. 331 (1793)).<sup>28</sup>

Other states likewise had waivers of immunity. The early Delaware Constitution (1792) authorized suits "against the state according to such regulations as shall be made by law" (*Federal and State Constitutions of the U. S.*, House Doc. No. 357 (59th Cong., 2d Sess.), Vol. 1, pp. 568, 569). A Maryland statute passed January 20, 1787, antedating the Constitution, authorized actions at law against the state for money claims, with a jury trial. 2 Kilty, *Laws of Md.*, c. LIII. In Georgia, persons claiming estates confiscated during the Revolution were permitted an appeal to the superior courts from a determination of a Board of Confiscation Commissioners (1 *Revolutionary Records of Ga.*, pp. 334, 341; 3 *Id.* 409). Compare a similar procedure in North Carolina (24 *State Records of N. C.*, p. 212) and a somewhat different procedure in New Jersey, also permitting judicial determination of the right to an estate subject to confiscation (*Acts of Council & General Assembly of New Jersey* (1776-1783)—

<sup>28</sup> The opinion was written by Judge Pendleton who, as President of the Virginia Convention elected to consider the Constitution, had been instrumental in its ratification. The claimant was represented by "Marshall," presumably John Marshall. Cf. H. Beveridge, *Life of Marshall*, p. 177.

(compiled by Peter Wilson, Trenton, 1784, printed by Isaac Collins)—pp. 43-46).<sup>39</sup>

## B. THE EXTENT OF THE FRAMERS OF THE CONSTITUTION

The waiver of sovereign immunity was thus a common practice in Anglo-American Law at the time of the adoption of the Constitution. If, as the *Williams* case suggests, the doctrine of sovereign immunity was known to the framers, the practice of waiving that immunity must have been equally familiar. That such was the case is in fact revealed in Hamilton's remarks in the *Federalist*, where he expressly distinguishes between suits with and suits without the consent of the sovereign. See Appendix C, pp. 131-135, *infra*. Against the century-old background of suits by consent against the Crown and the State, the use of the unqualified phrase "controversies to which the United States shall be a party" bespeaks an intention to extend the judicial power to cases where the United States is a party defendant upon a waiver of immunity, as well as where it is plaintiff.

Nothing in the proceedings of the Constitutional Convention indicates that the phrase in question was being used in a restrictive sense. On An-

<sup>39</sup> See also indications of suits against the state in a 1789 statute of Connecticut (*Acts and Laws of Conn.*, Jan. 1789 (New London, printed by T. Green & Son), pp. 373-376); and in an early Delaware statute (2 *Laws of Del.* (1700-1797), vol. 2, pp. 658-659). All these are more fully discussed in Appendix B, pp. 123-130, *infra*.

gust 20, 1787, Charles Pinckney moved <sup>40</sup> to add to the Report of the Committee of Detail the statement that "The Jurisdiction of the Supreme Court shall be extended to all controversies between the U. S. and an individual State, or the U. S. and the Citizens of an individual State."<sup>41</sup> Two days later, the Committee of Detail recommended that the judicial power be extended to controversies "between the United States and an individual State or the United States and an individual person."<sup>42</sup> No action was ever taken on this recommendation, but on August 27, 1787, the Constitutional Convention adopted the phrase now appearing in Article III, Section 2—"Controversies to which the United States shall be a party"—upon a motion by James Madison and Gouverneur Morris.<sup>43</sup> This "was

<sup>40</sup> *Documents Illustrating the Formation of the Union of the American States*, H. Doc. 398, 69th Cong., 1st Sess., p. 572.

<sup>41</sup> A year prior thereto Charles Pinkney had drafted and presented to Congress a report on August 7, 1786, calling for an amendment of the Articles of Confederation to provide for a Federal Judicial Court whose jurisdiction was to include appellate jurisdiction from state courts "in all causes . . . wherein questions of importance may arise, and the United States shall be a party." Charles Warren, *The Making of the Constitution*, p. 329. Subsequently he submitted the same plan to the Constitutional Convention, calling for a Supreme Federal Court with appellate jurisdiction from the state courts, including jurisdiction "in all causes . . . wherein the United States shall be a party."

H. Doc. 398, *op. cit.*, p. 965.

<sup>42</sup> H. Doc. 398, *op. cit.*, pp. 595-596.

<sup>43</sup> *Id.*, p. 624.

evidently adopted as a substitute for the Committee's recommendation and was probably intended to cover the same ground."<sup>44</sup>

There is no evidence at the Constitutional Convention of any intention that the phrase in question, more sweeping in scope than any of the preceding proposals, was used in other than its plain meaning. The delegates, most of whom were trained at the bar,<sup>45</sup> must have known the difference between party plaintiff and party defendant, and must have been aware that the term "party" embraces both. Since one can hardly attribute to the framers the prophetic ability to anticipate the derivation of judicial powers from an article professing to grant legislative powers, an intention to exclude from the federal judicial power the determination of claims against the Government would be tantamount to an intention to deny a mode of settling claims which had been available in the mother country for centuries. Such an intention is not easily to be conjured. Mr. Justice Sutherland, in the *Williams* case, did not suggest any possible reason why the makers of the Constitution, if they had given thought to the United States as a party defendant, would not have placed such a suit within the judicial power which they were defining. He apparently was of the view

<sup>44</sup> Charles Warren, *The Making of the Constitution*, pp. 536-537.

<sup>45</sup> Warren, *op. cit. supra*, p. 55.

that they had assumed that the Government could not be sued under any circumstances, and that therefore they did not intend Article III to give the courts jurisdiction over suits against the United States. It is more likely that, if the issue had been specifically presented, the framers would have disavowed any intention to exclude from the judicial power a class of cases, suits against the sovereign with its consent, which had been heard and decided by the English courts for centuries.<sup>16</sup>

The decision in the *Williams* case gains no support from the views of Marshall, Madison, and Hamilton on the suability of an individual state. Their remarks (set forth in Appendix C, pp. 131-133, *infra*) were addressed solely to the question whether there was a surrender of this immunity "in the plan of the convention." In denying that the Constitution affected the suability of the individual states, Marshall, Madison, and Hamilton were seeking to remove the fears of those, such as Patrick Henry, who believed that the Federal Constitution automatically subjected the states to suit (See Appendix C, pp. 133-134, *infra*). The Supreme Court rejected their interpretation in *Chisholm v. Georgia*, 2 Dall. 419 (1793), pointing out that the automatic waiver of state immunity, found in Section 2, did not necessarily mean an automatic waiver of Federal immunity. But

<sup>16</sup> Cf. Marshall, C. J., in *McCulloch v. Maryland*, 4 Wheat. 312, 407. "It is a Constitution we are expounding \* \* \*"

there is no hint that suits with the consent of the government would not be embraced within the Section, for obviously none of the objections based upon sovereignty would apply where the state voluntarily submitted itself to court proceedings; and the statements of Marshall, Madison, and Hamilton had no relevance to such a situation.\*

\* Despite the position taken by Marshall, Madison, and Hamilton, the Supreme Court in *Chisholm v. Georgia*, 2 Dall. 419, held that Article III subjected a state to suit without its consent by an individual citizen of another state. The opinion of Chief Justice Jay (at p. 477)\* included the following comments with respect to suits against the United States:

"Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this, in all cases of actions against states or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction, important conclusions are deducible, and they place the case of a state, and the case of the United States in very different points of view.

"I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could, in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided; I leave it a question."

These remarks are plainly confined to the question whether

*Hayburn's Case*, 2 Dall. 409, decided only five years after the Constitution was adopted, likewise contains the implication that claims against the United States would be embraced within Article III, Section 2, if the requisite judicial procedures were provided.

### C. THE JUDICIARY ACT

Contrary to the suggestion in the *Williams* case, the Judiciary Act of 1789 (1 Stat. 73) is authority for, rather than against, the view that Article III of the Constitution extends the judicial power to suits against the United States. Section 11 of the Act gives to "the circuit courts \* \* \* original cognizance \* \* \* of all suits of a civil nature \* \* \* where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and the United States are plaintiffs, or petitioners." Mr. Justice Sutherland in the *Williams* case thought that the words "where \* \* \* the United States are plaintiffs or petitioners" delineate the scope of

Article III, without more, removes the immunity of the United States from suit. Chief Justice Jay could not have had in mind suits to which the United States had consented, for there would then be no need for "power which the courts can call to their aid."

The only other contemporary references to the question whether the United States could be sued are a statement by George Nicholas, at the Virginia Convention, and a letter from Luther Martin (Attorney General of Maryland and delegate to the Constitutional Convention) addressed to the Maryland legislature. See Appendix C, pp. 134-135, *infra*.

the phrase "controversies to which the United States shall be a Party" in Article III. This assumes that Congress intended, by the Judiciary Act, to vest in the circuit courts all the judicial power conferred in Article III. But the Act and its legislative history contradict any such intention. Thus, Section 11 of the Act expressly withholds from the circuit courts the exercise of the judicial power over suits "where the matter in dispute" does not exceed five hundred dollars, even though nothing in Article III would preclude the bestowal of jurisdiction over such matters. Moreover, the House debates on the Act show that Congress recognized a clear distinction between the extent of the judicial power conferred by Article III, and the degree to which it was to be vested in the inferior courts by the Act.<sup>49</sup> Under these circumstances, the more likely inference is that Congress used the words "plaintiffs or petitioners," rather than the exact language of Article III, to show that the Act was not to exhaust the judicial power conferred in Article III, nor to operate as a consent to suit.<sup>50</sup>

<sup>49</sup> Annals of Congress, vol. I, pp. 782-785, 796-833, *passim*. The discussion, if any, in the Senate is not available, since the debates of that body were not printed until 1794, and there appear to have been no printed reports or hearings on the Act.

<sup>50</sup> The *Williams* case, at 289 U. S. 553, 574, cites with approval the following dictum of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 412:

"\* \* \* The universally received opinion is that no suit can be commenced or prosecuted against the United

In view of the foregoing considerations, we believe that the grant of jurisdiction in Article III Section 2 is not limited to cases in which the United States is a party plaintiff. The historical background upon which this conclusion is predicated was not, in all its aspects, before the Court in the *Williams* case. We submit that the words of Article III read literally and in their historic setting demonstrate that *Minnesota v. Hitchcock* and the earlier authorities rather than *Williams v. United States* state the correct doctrine, and that the judicial power exercised by the Court of Claims is part of that defined in Article III.

A matter argued but not mentioned in the opinion in the *Williams* case is that suit on a claim against the Government may be a "case arising under the laws of the United States," and for that additional reason an exercise of judicial power under Article III. This point, which was not mentioned in either the *Bakelite* or the *Williams* opinion, finds considerable support in *La Abra Silver Mining Co. v. United States*, 175 U. S. 423. In that case, the United States brought suit in the Court of Claims, pursuant to a special jurisdictional act, to ascertain whether an award

States; that *the judiciary act does not authorize such suits*  
 \* \* \* [Italics supplied.]

This statement suggests that the Judiciary Act, which is confined to creating inferior courts and bestowing judicial powers upon them, could have "authorized" suits against the United States.

which had been procured by the Mining Company was based upon fraud. The judgment of the Court of Claims was attacked on appeal to this Court on the ground that there was no "case or controversy" under Article III, Sec. 2 of which either the Court of Claims or this Court could take jurisdiction. This Court rejected the contention, and held the suit to be a "case arising under the laws of the United States." Mr. Justice Harlan, delivering the opinion for a unanimous court, said (175 U. S., at 455) :

II. It is said that the present proceeding based on the act of 1892 is not a "case" within the meaning of that clause of the Constitution declaring that the judicial power of the United States shall extend to all cases in law and equity arising under that instrument, the laws of the United States, or treaties made or which shall be made under their authority. Art. III, § 2. This Article, as has been adjudged, does not extend the judicial power to every violation of the Constitution that may possibly take place, but only "to a case in law or equity, in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the Article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution to

which the judicial power of the United States would extend." *Cohens v. Virginia*, 6 Wheat. 264, 405. \* \* \*

The jurisdiction of the Court of Claims to entertain claims against the United States likewise depends on a law of the United States—i. e., the Judicial Code Sec. 145 (28 U. S. C. 250). The decision in the *La Abra* case would therefore seem to be relevant here.

If we are correct in our views that the Court of Claims exercises judicial power under Article III, it follows that the Court of Claims is a constitutional court (*O'Donoghue v. United States*, 289 U. S. at 546).

C. THE COURT OF CLAIMS, LIKE THE COURTS OF THE DISTRICT OF COLUMBIA, MAY EXERCISE NON-JUDICIAL FUNCTIONS EVEN IF DETERMINED TO BE A CONSTITUTIONAL COURT

If this Court should depart from the dictum in *Ex parte Bakelite* and the decision in *Williams v. United States* concerning the nature of the Court of Claims, and revert to the earlier pronouncements that the judicial power involved in the determination of claims against the United States is included within Article III, this will not mean that Congress cannot continue to submit matters to the Court of Claims for reports and recommendations in a non-judicial capacity. For, even as a constitutional court exercising Article III judicial power, the Court of Claims may still

render advisory opinions under Judicial Code §§ 148 or 151 (28 U. S. C. 254, 257). Although this Court has held that a constitutional court may not be required to render advisory opinions (*Muskat v. United States*, 219 U. S. 346), it subsequently held that the courts of the District of Columbia, even though they exercised both judicial and non-judicial powers, were constitutional courts (*O'Donoghue v. United States*, 289 U. S. 516). There is no reason why the same cannot be true as to the Court of Claims.<sup>50</sup>

In *Postum Cereal Co. v. California Fig Nut Co.*, 272 U. S. 693, the power of the courts of the District of Columbia to take jurisdiction of appeals from the Patent Office and to render what

<sup>50</sup> There is also authority for the proposition that judges may act non-judicially in a voluntary capacity analogous to that of a commissioner. In *Hayburn's Case*, 2 Dall. 409, the three circuit courts expressed their opinion that the determinations which Congress had asked them to make of pension claims against the Government, subject to review by the Secretary of War, did not involve the judicial power of the United States which they were capable of exercising. The Circuit Court for the District of New York, consisting of Chief Justice Jay, Associate Justice Cushing, and District Judge Duane, was of the opinion, however, that the individual judges of the circuit court were capable of performing these functions as "commissioners" and not as a court. Subsequently the judges of the district courts did act in such capacity. See *United States v. Ferreira*, 13 How. 40. Similarly, the judges of the Court of Claims may assume the performance of like advisory functions at the request of Congress, sitting as commissioners and not as a court. See *Sanborn v. United States*, 27 C. Cls. 485, 490, mandamus to permit appeal denied, *In re Sanborn*, 148 U. S. 222.

the court characterized as "mere administrative determinations" was sustained on the ground that "Congress in its constitutional exercise of exclusive legislation over the District \* \* \* may vest courts of the District with administrative or legislative functions which are not properly judicial" although "it may not do so with this Court or any federal court established under Article III of the Constitution." But when the District of Columbia courts were subsequently declared in *O'Donoghue v. United States*, 289 U. S. 516, to be constitutional courts exercising Article III judicial power, their non-judicial jurisdiction was not disapproved but was explained as the product of Congress' plenary power over the District.

The reasons impelling the Supreme Court in the *O'Donoghue* case to recognize the power of constitutional courts located in the District of Columbia to exercise non-judicial as well as judicial functions are pertinent here. The power of Congress to impose non-judicial functions upon the courts of the District is derived from the clause of the Constitution giving Congress plenary power of legislation over the District. Article I § 8, cl. 17. Congress has been given the same plenary power over claims against the Government by the other clauses of Article I § 8. Congress alone has power "to pay the Debts \* \* \* of the United States," and may establish judicial or non-judicial machinery to

that end. Since there is thus a dual basis for the jurisdiction of the Court of Claims as well as for that of the courts of the District of Columbia, Congress should be able to request the Court of Claims to perform nonjudicial functions in addition to its judicial jurisdiction. It would seem an unduly rigid interpretation of the Constitution to hold that if Congress desires an advisory opinion it must establish a special tribunal serving such purpose only and may not make use of a court which, having judges expert in the field of claims, is best equipped to advise the legislature.

Where the courts have refused to accept advisory jurisdiction it has been for the most part under circumstances in which the court was asked to give non-judicial action a judicial guise and to render judgment in the usual manner. But here the non-judicial functions of the Court of Claims are totally distinct in procedure and form from its judicial jurisdiction. See *Pocahontas Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447.

The overruling of the *Williams* case and the reinstatement of the views uniformly held before that decision need not affect the doctrine of legislative courts as applied to the territories. The doctrine in fact originated in a case involving a territorial court. *American Insurance Co. v. Canter*, 1 Pet. 511 (1828), was an appeal from a decree

in admiralty rendered by a territorial court whose judges held a four-year appointment instead of the life tenure required by Article III § 1 of courts covered thereby. Faced with the prospect of having to invalidate the decree and to deny judicial powers to a territorial court so constituted this Court, in an opinion by Chief Justice Marshall, held that the limitations of Article III do not apply to a court established by Congress under the combined powers of the general and of a state government (1 Pet. at 546). This view has uniformly been applied to territorial courts (see *Ex parte Bakelite*, 279 U. S. at 450), and has never been repudiated. *Ex parte Bakelite*, 279 U. S. at 450, also stated that the courts of the District were created pursuant to congressional powers over the District of Columbia (Article I § 8) similar to those which Congress exercises over the territories (Art. IV § 3), and hence were likewise legislative courts. But this Court later repudiated that dictum, and in *O'Donoghue v. United States*, 289 U. S. 553, it held that the "plenary power given by the District clause of the Constitution" did not "destroy the operative effect of the judicial clause within the District"; that the courts of the District exercise judicial power of the United States and are hence constitutional courts whose judges are guaranteed against diminution of

compensation; and that unlike other constitutional courts, the courts of the District of Columbia, because of the nature of the territory within which they function, may also be given the same non-judicial jurisdiction permitted to state courts—for example, jurisdiction over quasi judicial or administrative matters. In the *O'Donoghue* case, this Court distinguished the cases involving the territorial courts on the ground that the territorial government was impermanent, limited to the period of pupillage of the territory, and that it was, therefore—

not unreasonable to conclude that the makers of the Constitution could never have intended to give permanent tenure of office or irreducible compensation to a judge who was to serve during this limited and sometimes very brief period under a purely provisional government which, in all cases probably and in some cases certainly, would cease to exist during his incumbency of the office. (at pp 537, 538)

As limited by the *O'Donoghue* decision, the cases involving the territorial courts must be deemed to rest on the state of pupillage of the territories and their peculiar character as the temporary property of the United States; they do not require a like classification of a court such as the Court of

<sup>31</sup> The minority felt that there was no difference between the power of Congress over the courts of the District of Columbia and that over the territorial courts (289 U. S. at 551).

Claims. The Court of Claims is rather to be assimilated to the courts of the District of Columbia, whose character as constitutional courts is not affected by their exercise of non-judicial power.

#### IV

#### THE JURISDICTION OF THIS COURT TO REVIEW THE JUDGMENT BELOW

The Court has requested that special attention be given the question of its jurisdiction to review the judgment of the court below.

This Court can only review judgments of the Court of Claims entered in a judicial capacity (*In re Sanborn*, 148 U. S. 222). If the act, contrary to its construction below, calls upon the Court of Claims to exercise a judicial function, there can be no question as to the power of this Court to review and reverse the judgment. Cf. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Actna Life Ins. Co. v. Haworth*, 300 U. S. 227. If, however, the act was properly considered to require the Court of Claims to exercise a ministerial, non-judicial function, considerable doubt arises as to the power of this Court to review the decision below.

In *Rostum Corral Co. v. California Fig Nut Co.*, 272 U. S. 693, the owner of a trade-mark appealed to the Court of Appeals of the District of Columbia from a decision of the Commissioner of Patents refusing to cancel the registration of an allegedly interfering trade-mark. The Court of

Appeals dismissed the appeal on the ground that the statutory provisions authorizing it had been repealed. An appeal from the judgment of dismissal was likewise dismissed by this Court, because decisions of the Court of Appeals on the merits in such cases were not judicial but administrative, and accordingly not subject to review in this Court. The Court pointed out that it had no power to pass even on issues of constitutional law unless presented in a justiciable case or controversy (citing *Prentiss v. Atlantic Coast Line Company*, 211 U. S. 210, and *Muskra v. United States*, 219 U. S. 346), and said (272 U. S. at 701):

With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the District Court of Appeals if it had heard the appeal and taken administrative jurisdiction, and by the same token have now no power to review its action in refusing such jurisdiction.

The principle enunciated in that case appears broad enough to cover this determination. On the assumption that the Special Act directed the Court of Claims to perform a non-judicial function, this Court has no power, under the *Postum* decision, to review the action of the Court of Claims whether it takes or refuses jurisdiction.

There may, however, be an important distinction between the instant case and the *Postum* case.

<sup>52</sup> Cf. *Muskra v. United States*, 219 U. S. 346.

In the *Postum* case, the Court of Appeals, in refusing to take jurisdiction on the ground that the statute which formerly conferred it had been repealed, was acting in an administrative and non-judicial character, construing a statute which had theretofore been held to involve a non-judicial matter (*Keller v. Potomac Electric Co.*, 261 U. S. 428, 443; *Baldwin Co. v. Howard Co.*, 256 U. S. 35; *Atkins v. Moore*, 212 U. S. 285). In the instant case, the Court of Claims, acting as a court, has refused jurisdiction purportedly conferred by a statute addressed to it as a court, because it considers the law to be unconstitutional. That is a determination peculiarly judicial in character (*McCullough v. Maryland*, 4 Wheat. 316), and one which may not normally be made by an administrative agency. *State v. Williams*, 232 Mo. 56; 30 A. L. R. 378. Moreover, the Special Act sought action judicial in form, with a right to apply to this Court for certiorari (R. 1-2; §§ 2, 4). Insofar as the Court of Claims purported to be exercising its judicial power as a court and made a determination reserved exclusively to the judiciary, its decision may be reviewable here.

If this Court should conclude, upon review, that the Court of Claims erred in not performing the directed function in its non-judicial capacity, a question arises whether it may direct the Court of Claims to hear the matter in a non-judicial capacity. We suggest that the answer is in the

negative, for reasons similar to those underlying the *Postum* case: However, if it concludes that error was committed below by the court acting in a judicial capacity, this Court may, pursuant to its general powers to take such action as is most consistent with the just disposition of a case, vacate the judgment of dismissal and remand the case for correction of so much of the error as lies within the judicial orbit.

Respectfully submitted,

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OCTOBER 1944.

## APPENDIX A

Act of Congress (Private Law No. 306—77th Congress).

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

SEC. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in

complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper B or pay line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved February 27, 1942.

## APPENDIX B

### WAIVER OF SOVEREIGN IMMUNITY IN ANGLO-AMERICAN LAW PRIOR TO THE ADOPTION OF THE CONSTITUTION

#### I. ENGLISH PRACTICE

Long before 1787 it was a common practice in England for the sovereign to waive his immunity from suit and permit individuals to assert their claims against the crown in the courts. The waiver of immunity was limited to particular types of claims and governed by special procedures. The development of these remedies against the crown are traced by W. S. Holdsworth in *A History of English Law*, Vol. IX, pp. 7-45, and may be summarized as follows:

It was recognized as early as the thirteenth century that the King was subject to the law and that, although ordinary writs did not lie against him in his courts, he was morally bound to do the same justice to his subjects as they could be compelled to do to one another. As yet, the methods by which the King could be approached were very informal. (*id.* p. 10). A request or petition for justice to the King would often assume some of the characteristics of an ordinary action. Litigants would sometimes vouch the King to warranty as if he were a common person. But the procedure for obtaining redress by petition was becoming a more settled practice and developing characteristics very different from those in an ordinary action (*id.* p. 11).

From the fourteenth to the middle of the seventeenth century, the nature of a petition of right became fixed (*id.* p. 12). Petitions which asked for something which the suppliant could claim as a right, if the claim were made against anyone but the King, were known as "petitions of right." Petitions which asked only for some favor to which the petitioner could have no legal claim were "petitions of grace." (*id.* pp. 13-14). Although the King could rightfully refuse to grant a petition of grace, he could not rightfully refuse to do what justice required when judgment had been rendered in a petition of right (*id.* p. 15).

The main use of the petition of right in the Middle Ages was to gain redress for wrongs which, if the case had been between subject and subject, would have been redressed by some of the *real* actions (*id.* pp. 17-18). The real actions covered a much larger field than that covered by the land law at the present day. Many objects which would now be effected by the making of a contract, and many wrongs which would now be redressable by action in tort were attracted to the law of property and were redressable by real actions. For example, instead of making a contract to pay a sum of money, the men of the Middle Ages granted an annuity or a *corody*; and where we would bring an action on the case for a nuisance, they would bring an assize of nuisance, or an assize of novel disseisin, or *quod permittat*. In addition to the wide field of wrongs redressable by the real actions, a petition would lie for a chattel interest in land; and according to the better opinion for chattels personal (*id.* p. 19).

While the petition of right did not lie for breach of contract, this was partly due to the fact that the law of contract was not yet fully developed, and partly to the fact that petitioners had alternative remedies (*id.* p. 21). Thus, a petition lay for omission to pay an annuity or a corody, because such a proceeding was regarded as a proceeding to recover an incorporeal thing; and a judgment could be given against the King to give a recompense, if he had failed in his duty to warrant the title of his grantee (*id.* p. 20). In the case of ordinary money claims, a petition to the King for a writ of Liberate, ordering the Exchequer to pay, or for a direction that the barons of the Exchequer should hear the petitioner's claim, was an easier and more expeditious remedy. In the main, however, the chief use made of the petition of right in the Middle Ages was the redress of grievances which, as between subject and subject, would have been redressed by some one of the *real* actions (*id.* p. 21).

Other remedies than the petition of right arose against the Crown because of the great procedural defects attached to the use of a petition of right (*id.* p. 22). (1) There was a lengthy preliminary procedure before the legal question at issue could be brought before the court. The petition had to be endorsed "let right be done" (*id.* p. 16). A special commission was then issued by the Chancery to take an inquest to find the facts. If the facts were not found satisfactorily, a second commission might issue to find them again (*id.* p. 22). If they were found satisfactorily, it was sometimes

necessary to put in a second petition to stir up the Crown to take the necessary step of answering the petitioner's plea and coming to an issue which could be heard on the common-law side of the Chancery, or sent into the King's Bench for trial (*id.* pp. 17, 22). In all cases begun by petition, the Crown could delay the petitioner by instituting a search for records which would support his title. (2) The Crown had many advantages in pleading. All conveyances and accounts which gave possession to the King had to be expressly stated in a petition. At any time, the King could stop a proceeding by the issue of a writ *rege incon-sulto*; and the judges could not then proceed without an order from the King. (3) When the petition of right turned upon a complaint redressable by a real action (which was usually the case), all the reasons which made real actions so dilatory applied to these proceedings. (4) The rule that a demandant could recover if he could show a better right than the tenant, did not apply to the King. To recover against the King, an absolute right had to be shown (*id.* p. 23).

The procedural difficulties outlined above gave rise to the remedies by traverse and *monstrans de droit*. The procedure by traverse arose as follows: One of the most usual ways in which the King secured possession of chattels or lands belonging to a subject was by the holding of an inquisition on the death of his tenant, or on the attainder or lunacy of any person. When the inquest found that the subject was possessed of certain property, this was seized by the King, who was then said to be entitled by office found. As

a general rule, anyone whose right was set aside by this finding, e. g., a person who had been disseised by the tenant or lunatic was left to his remedy by petition. In a few cases, however, the law allowed a person aggrieved to traverse, if he could, the facts found by the office entitling the King to possession (*id.* p. 24). The number of these cases was at first very small, but was increased by statute in 1360 and again in 1362. This latter statute also established the remedy of *monstrans de droit*, which allowed the subject in certain cases to confess the title found for the King and avoid it by showing his own right (*id.* p. 25). This statute was construed liberally and was further extended by an Act of 1548 (*id.* p. 26).

These remedies had three main advantages over the petition of right: (1) They cut out all the preliminary stages of procedure attached to the petition of right—the presentation of the petition, the issue of a special commission, searches for evidence for the King. (2) It was not necessary to get the King's special permission to go on with the hearing of the case. (3) The remedy of *monstrans de droit* substituted for an inquiry at large into the title of the parties, an inquiry into a specific defect in the office (*id.* p. 26).

The new remedies also had their disadvantages. (1) A party could not take advantage of a traverse unless the King had taken possession by an office found. Similarly, in order to take advantage of a *monstrans de droit*, he must have gotten seisin by office found, or in some other way which could not be traversed; and the subject must be able to confess the King's right and avoid

it by showing his own right. (2) If the King was entitled, not only by the office found, but by another title of record, the subject could not until 1548 traverse or confess and avoid both (*id.* p. 27). (3) The analogy of the case where a disseisee's right of entry was tolled and turned to a right of action was applied to determine the question whether a complainant could sue by *monstrans* or petition of right (*id.* p. 28). Were it not for these limitations, the remedies of traverse and *monstrans de droit* would have completely superseded the petition.

In addition to these two new remedies, extended powers of relief against the Crown became available to the subject in the new Courts of Augmentations, Wards, and Surveyors, which were created by statute in the reign of Henry VIII and subsequently merged into the Court of Exchequer (*id.* p. 29). While these courts were primarily administrative departments for the management on business lines of a vast quantity of property, they were given judicial powers which were very likely to be used when the Crown itself was a party. The Court of Augmentations, erected by statute in 1536, served partly as a department of audit, partly as an estate office, and partly as a franchise court to deal with the vast quantity of land confiscated from monasteries. The Court of Wards, created in 1540, was similarly constituted to manage the ancient feudal revenues of the Crown and especially to enforce the rights of wardship and marriage. The jurisdiction of these courts and the Court of Surveyors was varied many times by statute, copies of which

are not all available.<sup>1</sup> Generally speaking, it seems that these financial courts entertained claims with respect to the particular property turned over to such courts for administration (*id.* p. 30).<sup>2</sup>

From 1615 to the first part of the nineteenth century, there appear to be no reported cases based upon the petition of right.<sup>3</sup> However, during this period, several new remedies emerged for securing relief against the Crown.

*Equitable relief.*—In the case of *Parlett v. The Attorney General*, Hardres, 465 (1668),<sup>4</sup> it was first clearly recognized that the subject was entitled to equitable relief against the Crown. In that case the plaintiff had mortgaged property to a mortgagee. The legal estate had descended to the mortgagee's heir, who had been attainted of treason. The King had therefore seized his property. The plaintiff brought his bill in the Exchequer against the Attorney General for redemption. In finding for the plaintiff, the court rejected the argument that the plaintiff could only proceed by petition to the King. Chief Baron Hale based his decision on the ground that the Exchequer had jurisdiction in the matter as inheritor of the powers of the Courts of Augmentations and Surveyors. Atkins B. put the

<sup>1</sup> Plucknett, *A Concise History of the Common Law*, 3d Edition, p. 158.

<sup>2</sup> For example, the statute of 1541 (33 Henry VIII, c. 39) creating the Court of Surveyors, authorized the Court of Augmentations to determine claims by patentees against the King for defects in the interests which the King had purported to transfer to them.

L. Ehrlich, *Petitions of Right*, 45 L. Q. Rev. 60, 61, 62.

jurisdiction on a much broader basis, but his view was not accepted until after the eighteenth century. For some time the jurisdiction to give equitable relief against the Crown was supposed to be peculiar to the Court of Exchequer' (*id.* p. 30).

*Petition to the barons.*—Another remedy against the Crown arose out of the celebrated *Bankers' Case*, 14 S. T. 1, (1690-1700). In return for certain loans, Charles II. granted to the Bankers annuities charged on the hereditary excise. After 1683, payments were in arrears, and after the Revolution, the Bankers presented a petition to the barons of the Exchequer for payment of the amounts due to them. The case turned on whether this was a proper method of procedure for asserting such a claim, and the House of Lords held in the affirmative. All the judges were of the opinion that the Bankers could also have proceeded by petition of right. This case was of considerable influence in the revival of the petition of right during the nineteenth century (*id.* pp. 32-33). As a result of the *Bankers' case*, the subject could now not only petition for a writ of Liberate, but also petition the barons of the Exchequer for relief (*id.* p. 35).

Thus, the study by Holdsworth shows that there had developed a number of judicial procedures in England, for asserting claims against the sovereign, including (1) the petition of right, (2) traverse of office found, (3) *monstrans de droit*, (4) writ of liberate, (5) peti-

<sup>1</sup> *Cuning Reade v. The Attorney General*, (1711), 2 Atkyns 223; *Bodges v. Wheat*, 1 Eden at pp. 255-256; Bl. Comm., iii, 428-429.

tion to the barons of the Exchequer, and (6) bill against the Attorney General for equitable relief in the Court of Exchequer.—Accordingly the practice of waiving the sovereign's immunity from suit was well known to English Law long before the adoption of the Federal Constitution in America.

## II. AMERICAN PRACTICE

1. According to the Virginia Court of Appeals, "it has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an independent state) that all persons have not enjoyed this right by express statute" *Higginbotham's Executor v. The Commonwealth*, 66 Virginia 627, 637 (1874). The statute here referred to was an Act of 1788<sup>9</sup> establishing a Board of Auditors for public accounts, and including the following provision:

V. Where the auditors acting according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other

<sup>9</sup> 9 Henings, *Statutes at Large*, p. 540.

person who is entitled to demand against the commonwealth any right in law or equity.

An exception to this Act seems to have been adopted in the case of impressed property, for, by an Act of November, 1781,<sup>6</sup> the county courts were empowered to receive claims against the public for impressed property, for the purpose of ascertaining the value of the property and then submitting to the legislature a report and a transcript of the proceedings. However, even with respect to impressed property, there is a reported case in which the legislature referred the claimant back to the courts, and he succeeded in securing a judgment in his favor.

In *Commonwealth v. Cunningham & Co.*, 8 Va. 331 (1793), the owner of a vessel impressed during the Revolutionary War presented his claim to the county court and in 1784 secured a certificate covering its value. When the auditor refused to honor the certificate, the claimant applied to the legislature which referred him back to the judiciary. A judgment for his favor in the district court was affirmed by the Court of Appeals. The opinion of the court was written by Judge Pendleton who had been President of the Virginia Convention elected to consider the Constitution and who had employed his influence to obtain its ratification.<sup>7</sup> The report of the case shows that the claimant was represented by

<sup>6</sup> 10 Henings, *Statutes at Large*, p. 468. "An Act for adjusting claims for property impressed or taken for public service."

<sup>7</sup> 8 Va. vii.

"Marshall." No doubt this was John Marshall, for Beveridge states (A. J. Beveridge, *The Life of John Marshall*, vol. II, p. 177) that from 1790 until 1799 Marshall argued 113 cases decided by the Court of Appeals, and appeared in practically every important case handled by that tribunal.

2. In Maryland, the legislature, on January 20, 1787, adopted the following statute "to provide a remedy for creditors and others against the state":

Whereas individuals may have claims against this state for money, which they cannot settle and adjust with the auditor-general, and it is reasonable that some mode should be adopted to afford such individuals an opportunity of trying the justice of their claims at law;

II. *Be it enacted, by the General Assembly of Maryland*, That any citizen of this state, having any claim against this state for money, may commence and prosecute his action at law for the same against this state as defendant, by issuing a summons directed to the attorney-general, and sending with such summons a short note expressing the cause of action, and such person may declare, that the state is indebted unto him in any sum he thinks proper, and the attorney-general shall plead thereto, and the issue shall be made up, and the jury shall try such issue or issues, and if they find for the plaintiff, they may assess such damages as they may think just, and the same shall be paid by the state, and with costs, if the jury find more due to the plaintiff than admitted by the auditor, but if the jury find for the state, the plaintiff shall pay costs of suit, and be liable to

execution therefor; and the attorney-general shall exhibit the claim of the state, if any, and if the jury shall find that the plaintiff is indebted to the state, they may find accordingly, and judgment may thereupon be entered and given against him for such sum and costs of suit, and such plaintiff may appeal in the same manner as private persons can by law appeal in suits between them, on giving bond with security, and the attorney-general may also appeal if he thinks proper.

III. *And be it enacted*, That where any person shall file a bill in chancery against the state, that process shall and may be served on the attorney-general, which service shall be effectual to all intents and purposes, according to the notice of the process issued; provided, that where any injunction is prayed to stay proceedings at law for the payment of any debt claimed by the state, the chancellor shall not or on such injunction on the affidavit of the complainant only, but shall be fully satisfied by other proof, that the material facts in the complainant's bill are true.

3. Under the Georgia Confiscation Act of 1778, forfeiting the estates of persons disloyal to the state during the revolution, all persons claiming any right or interest in a sequestered estate or pretending to be a creditor of the person attainted were to produce and exhibit their claims to a Board of Confiscation Commissioners in the county. The Attorney General was directed to defend the right of the State, as well before the said boards, as in any of the Superior Courts

<sup>2</sup> Kilty, *Laws of Maryland*, c. LIII.

against the same," and discontented claimants were given the right of appeal from the "determination" of the Board to the Superior Courts.\* In accordance with this procedure, we find a report of the "Committee on Petitions" of the legislature in 1782 making the following recommendation:

No. 131 of Elizabeth Whitfield, Setting forth that a Certain Lott of Land in the Town of Savannah Sold by the Commissioners of Confiscated Estates, Praying for the said Lott of Land. The Committee are of opinion it ought to be referred to a Court of Law; which was agreed to.†

4. Under the New Jersey Confiscation Act of April 18, 1778, the procedure to recover lands improperly seized by the state was in some respects similar to the remedy of traverse of office developed in England. The Commissioners appointed pursuant to the Act were to "make return" to a justice of the peace in the county, of the name and place of late abode of each person "whose Personal Estate and Effects the said Commissioners \* \* \* have seized" and to demand a precept for the summoning of a jury to inquire whether the named person was an offender within the meaning of the Act. After an inquisition by a jury, the justice of the peace was to certify the inquisition and make return to the next Inferior Court of Common Pleas. If the jury found the person to be an offender, a proclamation was to be made in open court to the

\* *The Revolutionary Records of the State of Georgia* (Compiled by Allen D. Candler, Atlanta, 1908), vol. 1, pp. 334, 341-342.

† *Op. cit.* vol. 3, p. 409.

effect that the "Person against whom such inquisition hath been found or any Person on his Behalf, or who shall think himself interested in the Premises" might appear and traverse the inquisition. "Upon the filing of a bond, the traverse was to "be received and a Trial thereon awarded." If no person appeared to traverse the inquisition, the commissioners were to publish the effect of the proclamation within thirty days after which another opportunity to traverse was to be provided. Should there then be no appearance, the inquisition was to be taken as true and final judgment entered in favor of the state.<sup>10</sup>

5. Under the North Carolina Confiscation Act of 1779, establishing Boards of Commissioners in each county to administer and sell the estates declared forfeited by the Act, it was provided "that if it shall appear to any County Court that any Person \* \* \* has or pretends to have any 'Right of Title in Law' to any of the property declared forfeited by the Act, "such Court shall stay all further proceedings of the Commissioners thereupon, and shall send up a true and exact State of such Claim to the Superior Court of the District" which was then to "determine the Legal Right and Title of the Person so claiming, by Jury in the same Manner as in Suits at Common Law, and such Determination when had shall be final \* \* \*." <sup>11</sup> By a later act of 1781, further effort was made to protect the property of

<sup>10</sup> *Acts of the Council and General Assembly of the State of New Jersey (1776-1783)*, compiled by Peter Wilson, Trenton, 1784, printed by Isaac Collins, pp. 43-46.

<sup>11</sup> *The State Records of North Carolina* (edited by Walter Clark, Goldsboro, N. C., 1905), vol. 24, p. 212.

"innocent persons" by providing that the county courts were to "make inquiry" to determine what persons "in the opinion of the court" had forfeited their property, and were then to furnish copies of such proceedings to the commissioners of confiscated property. Seemingly, aggrieved persons might institute a proceeding for the return of their property, for the statute expressly provided that the county courts were "impowered at any time to re-consider" their determinations, and "if necessary, to order the property returned to the owners."<sup>12</sup>

6. Delaware clearly recognized that its immunity from suit might be waived, for, Article I, Section 9, of its constitution of 1792 provided that: "\* \* \* Suits may be brought against the State, according to such regulations as shall be made by law."<sup>13</sup> Earlier, under the statutes confiscating the property of persons disloyal to the state during the Revolutionary War, the courts had played a significant role in adjudicating claims of wrongful seizure and claims by creditors. By the Act of June 5, 1779, it was provided "That the Justices of the Court of Common Pleas in each county" were "to receive the claims and order the trials respecting the title of any \* \* \* lands \* \* \* sold" by virtue of the Act "and claimed by any person \* \* \*." A jury of twelve was to be summoned "to hear, try and

<sup>12</sup> *Id.*, p. 398.

<sup>13</sup> *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America*, House Document No. 357 (59th Cong., 2nd Sess.), vol. 1, pp. 568, 569.

"determine" such claims and its verdict was to be "final and conclusive to all parties without further appeal."<sup>14</sup>

7. There is some evidence that the judiciary of Connecticut participated in the settlement of claims against the state. This evidence is found in the Act of January 1789, which provided:

That from and after the first Day of March next, *all Demands against this State, not first liquidated and allowed by the General Assembly, or by the Governor and Council; or House of Representatives, or Supreme Court of Errors, or by the Superior Court, or by a Court of Common Pleas, by Virtue of some express Law;* shall be liquidated and settled by the Comptroller, who shall give Orders on the Treasurer, for the Balances, by him found and allowed, before the Treasurer shall pay the same; any Thing in said Act notwithstanding.<sup>15</sup> [Italics supplied.]

<sup>14</sup> *Laws of the State of Delaware* (1790-1797). (printed by Samuel and John Adams, New-Castle, 1797). vol. 2. pp. 658-659.

<sup>15</sup> *Acts and Laws, Made and Passed by the General Court or Assembly of the State of Connecticut, in America*; holden at New Haven (by Adjournment) on the first Thursday of January 1789; (New London: printed by T. Green and Son), pp. 375-376.

## APPENDIX C

### EXCERPTS FROM WRITINGS AND DEBATES ON THE FEDERAL CONSTITUTION

I. Comments on the provision of Article III extending the judicial power "to Controversies between a State and Citizens of another State":

1. *Alexander Hamilton* (Federalist, No. 81, II, pp. 125-126):

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sov-

ereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

2. *John Marshall* (Elliot's Debates, 2d. Ed., pp. 555-556):

With respect to disputes *between a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If

an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

3. *James Madison*. (Elliot's Debates, 2d. Ed., III, p. 533):

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

4. *Patrick Henry* (Elliot's Debates, 2d. Ed., III, pp. 543-544):

As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it.

What! is justice to be done to one party, and not to the other? If gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New York could not, before the war, collect money from Connecticut! The state judiciaries are so degraded that they cannot be trusted. This is a dangerous power which is thus instituted. For what? For things which will seldom happen; and yet because there is a possibility that the strong, energetic government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous. Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society and foreign nations? Is there any precedent for a tribunal to try disputes between foreign nations and the states of America? The honorable gentleman said that the consent of the parties was necessary: I say that a previous consent might leave it to arbitration. It is but a kind of arbitration at best.

II. Comments on the provisions of Article III extending the judicial power "to controversies to which the United States shall be a Party":

1. *Luther Martin's* letter to the legislature of Maryland (*Elliot's Debates*, 2d Edit., I, pp. 344, 382):

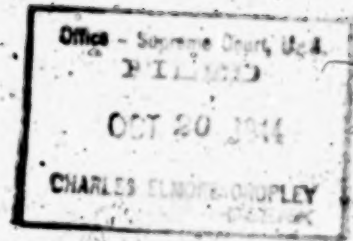
Thus, sir, in consequence of this appellate jurisdiction, and its extension of facts as well as to law, every arbitrary act of the general government, and every oppression of all that variety of officers appointed

under its authority for the collection of taxes, duties, impost, excise, and other purposes, must be submitted to by the individual, or must be opposed with little prospect of success, and almost a certain prospect of ruin, at least in those cases where the middle and common class of citizens are interested. Since, to avoid that oppression, or to obtain redress, the application must be made to one of the courts of the United States—by good fortune, should this application be in the first instance attended with success, and should damages be recovered equivalent to the injury sustained, an appeal lies to the Supreme Court, in which case the citizen must at once give up his cause, or he must attend to it at the distance; perhaps, of more than a thousand miles from the place of his residence, and must take measures to procure before that court, on the appeal, all the evidence necessary to support his action, which even if ultimately prosperous, must be attended with a loss of time, a neglect of business, and an expense, which will be greater than the original grievance, and to which men in moderate circumstances would be utterly unequal.

2. *George Nicholas*, at the Virginia Convention (Elliot's Debates, 2d Ed., III, pp. 476-477):

\* \* \* But he supposes that Congress may be sued by those speculators. Where is the clause that gives that power? It gives no such power. This, according to my idea, is inconsistent. Can the supreme legislature be sued in their own subordinate courts, by their own citizens, in cases where they are not a party? They may be plaintiffs, but not defendants. \* \* \*

FILE COPY



IN THE  
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 26**

**ALLEN POPE,**

*Petitioner,*

*vs.*

**THE UNITED STATES.**

**ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS**

**BRIEF OF JOHN W. CRAGUN, AMICUS CURIAE**

**JOHN W. CRAGUN,**

House  
1944  
1st sess. (pp. 3, 4)  
pp. 331, 332  
409  
of the Constitution

The judgment of the  
Supreme Court

The judgment of the  
on June 23, 1944, 31  
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The Court is in  
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of the Court

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Statement

Undersigned, the *amicus curiae*, files this brief (with leave of the Court and with the permission of counsel for the petitioner and respondent in the above case) by reason of counsel's interest in cases pending are to be filed in the Court of Claims pursuant to special jurisdictional acts. Some of these special jurisdictional acts direct the Court of Claims to enter a specified judgment in the event stated facts are found by that court. The ground of the parties' contentions in this Court have been broadly enough taken

that, should the Court accept some of the theses advanced, the validity of other jurisdictional acts with which the *amicus* is concerned may be threatened.

### Argument

This brief passes without comment the rather mild effect which may be attributed to the jurisdictional act under which the litigation was commenced below (Act of February 27, 1942, c. 122, 56 Stat. 1122). This brief deals rather with the most serious view which could be taken of that legislation—that Congress has directed the Court of Claims to enter a judgment for a claimant in that court, in a case which the court had previously ruled against the claimant. And this brief assumes<sup>1</sup> that the court below exercises only the purest of judicial power, and cannot in any case be treated differently than could a district court of the United States. Thus taken, the special jurisdictional act is not unconstitutional.

Reduced to its simplest, this case is merely one where two parties have agreed that a previous judgment settling their differences should be reopened, and a new judgment should be entered to be calculated on agreed facts. Petitioner has agreed by suing under the new jurisdictional act. Respondent has agreed through that agency, the Congress, to which the Constitution confides the determination of whether such a settlement is proper. And until the decision below, it has never been questioned to the knowledge of the *amicus* that

<sup>1</sup> The assumption is merely *arguendo*. Counsel signing this brief wholly disagrees with the conclusions of counsel for respondent that *Williams v. United States*, 289 U. S. 553, is in error in finding a distinction between a "constitutional" and a "legislative" court, and that all are Article III courts except, perhaps, as to the doctrine of legislative courts as applied to the territories" (Brief for the United States, p. 106). The point need not be developed; for if the act here in dispute is valid as to a constitutional court, *a fortiori* it binds a court the mere creature of Congress, which there be.

a court in entering a judgment upon such a consent or stipulation was not exercising judicial power, or that the parties in submitting such an arrangement were not permitting the court "with independence and single-mindedness to justice" to perform "the responsible and dignified function of doing justice" for which it was created. (Quotations are from the opinion below, 100 C. Cls. 375, 384.)

Time out of mind, private parties defendant have consented to a judgment, or have confessed judgment, or have stipulated facts, or submitted cases on an agreed statement of facts. The common law was well acquainted with the writ of *cognovit actionem*, whereby a defendant confessed judgment as to part or all of an action. 3 BLACKSTONE, *Commentaries*, p. 397. So far as counsel is aware, it has never been suggested that a defendant, so consenting or confessing, has been considered to subject the court's decision to his mere will (opinion below, 100 C. Cls. at p. 387), or interfered with the court's "desire only to be permitted to act as a court" (opinion below, 100 C. Cls. at p. 388). Rather, "Parties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." *Pacific R. R. v. Ketchum*, 101 U. S. 289, 295.

The fact is, of course, that a judgment entered pursuant to agreement of the parties is just as much a final pronouncement of the court, with all the implications of *res judicata*, and all the rights to its enforcement, which attend any other judgment. "The same general rules which govern judgments generally apply to a judgment by consent or upon stipulation. It is an estoppel, merger or bar under the same circumstances and to the same extent as any other judgment, . . . ." 2 FREEMAN, *Judgments* (1925).

663, pp. 1395-6. "A decree for carrying out a settlement and compromise of a suit is certainly not, of itself, erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that those were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached." *Thompson v. Maxwell*, 95 U. S. 391, 397; cf. *Harding v. Harding*, 198 U. S. 317, 335 (referring to Illinois law).

The fact that a case between the parties has previously been reduced to judgment makes no difference. In the first place, if an entirely new action be instituted, it is necessary for the parties to plead *res judicata* in bar of the second suit or else that second suit will go to judgment, and itself become the bar. *Brar v. Campbell*, 177 U. S. 649, 654-5; cf. Rule 8(c), RULES OF CIVIL PROCEDURE. The court is not put upon by a party's failure to plead the earlier judgment.

In the second place, if the suit is not a new suit but the reopening and setting aside of the former judgment so that a new judgment, by consent, can be reached, still the parties may agree to it. "The rule which prevents the court from interfering with its judgments entered at terms which have passed can have no application to orders or judgments entered by the express consent and agreement of all parties interested." *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898; 1 FREEMAN, *Judgments* (1925), § 142, note 2.

The mere fact that a court has only a routine step to take does not make its action non-judicial in character. In the ordinary case, the court has discretion to rule improperly upon the ultimate case presented; and if it reach an erroneous judgment, it is corrected on appeal. *Ex parte Rosier* (App. D. C., 1942), 133 F. 2d 811, 330. Even with respect to those administrative matters where the court exercises "discretion", it need not follow that there are at

least two ways in which it may rule without committing error; there may be only one way in which the discretion may be exercised. Cases in which it has been held an abuse of discretion to rule in one of the only two ways which are open are exemplified by *Langnes v. Green*, 282 U. S. 531, and *Cornwell v. Cornwell* (1941), 73 U. S. App. D. C. 233, 118 F. 2d 396, 398-9. (Cf. *Arenas v. United States*, No. 463 O. T. 1943, U. S. Sup. Ct. (decided May 22, 1943), citing *Perkins v. Elg*, 307 U. S. 325, 349.) And notwithstanding the court properly can rule in only one way, it has never been supposed that the court in acting in the only way permitted does not exercise judicial power.

It follows that the only constitutional question of possible substantiality is whether the United States has actually consented, through the proper agency, to the judgment sought by petitioner. Petitioner properly appealed to Congress; and its action in adopting the jurisdictional act, thereby consenting on the part of respondent, is constitutional. This Court ruled in *United States v. Realty Company*, 163 U. S. 427, 440-441:

"Under the provisions of the Constitution (article 1, section 8), Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general

principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity."

Previously, the court below recognized this doctrine as to cases where Congress did not pay a claimant directly, but referred the claimant to the court. In *Garrett v. United States*, 70 C. Cls. 304, 315, it ruled:

"If Congress has the power to pay these claimants by making an appropriation out of the Treasury, it seems it would undoubtedly have the authority to enact a statute recognizing such moral obligation, assume liability for its payment, and vest the court with authority to hear and adjudicate such claims and to enter judgment in favor of those to whom the money belongs. The claimants in either case would receive their money by virtue of an act of Congress."

Or, *Edwards v. United States*, 79 C. Cls. 436, 445—

"The authority of Congress to prescribe the basis on which a claim shall be adjudicated, that is, to pre-

scribe the conditions under which a citizen may be compensated for losses suffered under a contract, or even where no contract exists, or to create a liability on the part of the Government where no legal liability in fact exists and to waive any legal defense on the part of the Government, is no longer subject to question."

A previous case in this Court, fully as serious as the present, evinced no doubt by respondent, by this Court or by the court below as to the power of Congress even after final judgment of the court below and its affirmance here. *United States v. Klamath and Moadoc Tribes*, 304 U. S. 119, earlier case, 296 U. S. 244. There, after the claimant had lost its case, Congress directed the court below "to reinstate and retry said case \* \* \* upon the present pleadings, evidence, and findings of fact", with appeal to this Court. 304 U. S. at pp. 120-121. The claimant then went to the Court below and obtained judgment. *Id.* And in earlier cases neither this Court nor the court below has seen any constitutional defect in the exercise by Congress of its constitutional prerogative to pay the debts by providing for their reduction to judgment in a court. *Cherokee Nation v. United States*, 270 U. S. 476. (*res judicata* waived); *Roberts v. United States*, 92 U. S. 41 (permitted suit for additional compensation for carrying mail, not covered by contract).

In fact, this exercise of power of Congress has been so long continued that it is scarcely conceivable that everyone heretofore could have been mistaken as to its constitutional basis. There are set forth in the note <sup>2</sup> some of the more

<sup>2</sup> *Nock v. United States*, 2 C. Cls. 451 (*res judicata* waived); *Caldera Cases*, 15 C. Cls. 546 (*res judicata* waived); *Braden v. United States*, 16 C. Cls. 389 (defense that agents' acts of negligence were unauthorized, (waived)); *Boudinot v. United States*, 18 C. Cls. 716, 728 (permits suit because of tort committed by defendant's officers); *Walton v. United States*, 24 C. Cls. 372 (permitted suit in tort for negligence of defendant's agents); *Palmer v. United States*, 26 C. Cls. 82 (statute of limitations waived);

important cases in which has been recognized or given effect the right of Congress to exercise its power with respect to the just obligations of the United States, to waive defenses, establish a rule of decision favorable to the claimant, or create a right of action in his favor.

The case of *United States v. Klein*, 13 Wall. 128, relied upon below, is wholly beside the point. Even if that case be regarded as in full vigor despite the *quære* chargeable against it in the light of *Williams v. United States*, 289 U. S. 553, 562-563, still in that case Congress was not attempting to concede some right on the part of the United States, but to take a right from a citizen—and that as to a matter (pardon) with respect to which power was not lodged in Congress. Since the decision of the present case, the court below has ruled (*Menominee Indians v. United States*, unreported, No. 4429), decided February 7, 1944), "We think that the true reason for unconstitutionality of legislation, where it has been found in such cases [by which the court

*Murphy v. United States*, 35 C. Cls. 494 (defense of unauthorized act waived); *Southern Railway v. United States*, 45 C. Cls. 322 (defense of unauthorized act waived); *Snare & Triest v. United States*, 46 C. Cls. 109, 50 C. Cls. 201 (permitted suit in tort); *Irby, Executor v. United States*, 57 C. Cls. 60, 63 (statute prescribed rule of decision for damages); *Export Oil Corporation v. United States*, 64 C. Cls. 342, 350 (res judicata waived); *Lower Tribe v. United States*, 68 C. Cls. 585 (permitted tribal suit on oral premise of agents unratified by Congress); *Garrett v. United States*, 70 C. Cls. 304 (created right of action in favor of petitioner); *Butler Lumber Co. v. United States*, 73 C. Cls. 270, 289 (permitted suit in tort for unauthorized act of agent); *Alegck v. United States*, 74 C. Cls. 308 (created liability although there was no taking by United States); *Rudel Oyster v. United States*, 78 C. Cls. 816 (permitted suit in tort for negligence of defendant's agent); *Edwards v. United States*, 79 C. Cls. 436, 447 (waived defense of accord and satisfaction); *Stubbs v. United States*, 86 C. Cls. 152 (permitted recovery for losses to silver-fox farm and trading post business occasioned by extension of limits of a national park); *Ute Indians v. United States*, 45 C. Cls. 440 (permitted suit for land taken by United States "as if disposed of under the public land laws of the United States"); *Indians of California v. United States*, 98 C. Cls. 583, 599, cert. denied 319 U. S. 764 (permitted suit on unratified treaties with the United States).

below did not mean to include the *Klein* case], is in its deprivation of litigants of existing rights, rather than in its asserted attempted exercise by the legislature of judicial power." So here: If the parties are in dispute, as where the United States by retroactive legislation would seek to take the property—*i. e.*, the benefits of a judgment—from a litigant in express contradiction of the Fifth Amendment, then doubtless the court must decide the merits of the controversy.° But if Congress has the power to confess judgment or consent to reopening a judgment, and the claimant is willing to accept that consent, it is no imposition upon anybody. The court must agree, since it has no vested interest of its own in the previous judgment; the executive (in the person of attorneys for the United States) must agree, since not the executive but Congress has power to speak for respondent in the matter.

### Conclusion

The judgment of the Court of Claims should be reversed.

Respectfully submitted,

JOHN W. CRAGIN,

*Amicus Curiae.*

(4566)

**SUPREME COURT OF THE UNITED STATES.**

No. 26.—OCTOBER TERM, 1944.

Allen Pope, Petitioner,  
vs.  
The United States.

On Writ of Certiorari to the  
Court of Claims.

November 6, 1944.

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether Congress exceeded its constitutional authority in enacting the Special Act of February 27, 1942, 56 Stat. 1122, by which, "notwithstanding any prior determination" or "any statute of limitations", it purported to

1. That jurisdiction be, and the same is hereby conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, as described and by the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

"Sec. 2. The Court of Claims is hereby directed to determine and render judgment as to contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for extra work performed for which he has not been paid, but of which the Government has received the use and benefit thereof; for the excavation and concrete work found by the court to have been performed by the said Pope in compliance with the orders of the contracting officer, which by the plans for the work were so changed as to have the upper B' or pay, for the purpose of building the timber trestle, varying from the side walls of the tunnel; and for the work of excavating cutbanks which were run over the tinned arch and for the work of excavating in spaces with deep packing and grouting, which had to be constructed in front of the tunnel for the packing to be determined by the kind of method as described by the court and based on the volume of ground water in the cut and the nature of the soil to be packed. And the court is hereby directed to determine the value of the work done by the said Pope and his heirs or personal representatives in the above matters and to award the same to the said Pope or his heirs or personal representatives."

1. The first part of the document is a letter from the author to the reader, explaining the purpose of the study and the methods used. The letter is dated 1964 and is addressed to the reader.

confer jurisdiction on the Court of Claims to "hear and determine", and directed it to "render judgment" upon, certain claims of petitioner against the Government in conformity to directions given in the Act.

Petitioner brought the present proceeding in the Court of Claims to recover upon his claims as specified and sanctioned by the Special Act. The court dismissed the proceeding on the ground that the Act was unconstitutional. 100 Ct. Cls. 375.

It thought that in requiring the court to make a mathematical valuation of the amount of petitioner's claims upon the basis of data enumerated in the Act and to give judgment for the amount so ascertained, notwithstanding the rejection of those claims in an earlier suit in the Court of Claims, the Act was an unconstitutional encroachment by Congress upon the judicial function of the court. Holding that it was free to ignore the congressional command because given without constitutional authority, the court gave judgment dismissing the proceeding.

The case comes here on petition for certiorari which assigns as error the ruling below that the Congressional mandate was without constitutional authority. Because of the importance of the questions involved we issued the writ, 321 U. S. 761. For reasons which will presently appear, we hold that we have jurisdiction to review the judgment below.

Several years before the enactment of the Special Act, petitioner brought suit in the Court of Claims to recover amounts alleged to be due upon his contract with the Government for the construction of a tunnel as a part of the water system of the District of Columbia. The construction involved certain excavation and certain filling of the excavated space, in part with concrete and in part with dry packing and grout. Dry packing consists of closely packed broken rock, into which is pumped the grout, a thin liquid mixture of sand, cement and water, which, when it hardens, serves to solidify and strengthen the dry packing.

Included in the demands for which the suit was brought were certain claims which are now asserted in this proceeding. They comprise a claim for additional excavation and concrete work alleged to have been required because of certain orders of the contracting officer, and a claim for dry packing and grout furnished by petitioner and placed by him in certain excavated space outside the so-called "B" line shown on the contract drawings. The

"B" line marked the outer limits of the tunnel beyond which, by the terms of the contract, petitioner was not to be paid for excavation.

In the first suit it appeared that petitioner sought recovery for excavation, for which he had not been paid, of the space at the top of the tunnel where the contracting officer had lowered the "B" line by three inches, thus decreasing the space for the excavation for which the contract authorized payment to be made. The Court of Claims denied recovery of this item. The contracting officer had also directed the omission of certain timber supports or lagging required by the contract to be placed on the side walls of certain sections of the tunnel. Cave-ins from the sides resulted, making it necessary that the caved-in material be removed and that the resulting space be filled with concrete, all at increased expense to petitioner. The Court of Claims made findings showing the amount of the additional excavation and concrete work claimed, but denied recovery on these items because the order of the contracting officer for the additional work involved a change in the contract which was not in writing as the contract required.

The Court of Claims also denied petitioner's claim for dry-packing and grout. It was of opinion that the Government had received the benefit of and was liable for whatever dry packing petitioner had done and for so much of the grout as had actually found its way into the dry packed space and had remained there. But it denied recovery because of deficiency in the proof as to the extent of this space. The only proof offered was the "liquid method" of computation, based on the number of bags of cement used in the preparation of all the grout furnished by petitioner, the cement constituting a fixed proportion of the grout. The court held, with the Government, that the seepage of the grout into areas outside that dry packed rendered the liquid method an unreliable measure for determining either the volume of the dry packing or the amount of the grout required for it. The court gave judgment accordingly, while allowing to petitioner other claims upon his contract with which we are not here concerned. Petitioner's motions for a new trial were denied by the Court of Claims, and this Court denied certiorari. 303 U. S. 654.

The Special Act of Congress directed the Court of Claims to "render judgment at contract rates upon the claims" of peti-

tioner for certain work performed for which he has not been paid, but of which the Government has received the use and benefit, and gave jurisdiction to this Court to review the judgment by certiorari. Section 2 of the Act defined the work to be compensated as

"the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing."

The Act further directed that the court should consider as evidence in the case "any or all of the evidence" taken by either party in the earlier suit, "together with any additional evidence which may be taken."

The Court of Claims in construing the Special Act said 100 Ct. Cls. p. 379:

"A perusal of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add the results and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would bid for the act, begin it now, and to decide all questions of fact except certain simple computations."

So construed it thought the Special Act directed the Court of Claims to decide again the case or controversy which it had decided in the first suit, "to decide it for the plaintiff and give him a judgment for an amount determined by a 'simple com-

putation, based upon data referred to in the Special Act." This it concluded Congress could not "effectively direct."

For this conclusion it relied upon *United States v. Klein*, 13 Wall. 128, in which this Court ruled that Congress was without constitutional power to prescribe a rule of decision for a case pending on appeal in this Court so as to require it to order dismissal of the suit in which the Court of Claims had given judgment for the claimant. Decision was rested upon the ground that the judicial power over the pending appeal resided with this Court in the exercise of its appellate jurisdiction, and that Congress was without constitutional authority to control the exercise of its judicial power and that of the court below by requiring this Court to set aside the judgment of the Court of Claims by dismissing the suit.

As the opinion in the *Klein* case pointed out, pp. 144, 145, the Act of March 17, 1866, 14 Stat. 9, conferred on the Court of Claims judicial power by giving it authority to render final judgments in those cases and controversies which, pursuant to existing statutes, had been previously litigated before it. By later statutes this authority was extended to future cases and the Court has since exercised the judicial power thus conferred upon it. See *Ex parte Bakelite Corp'n*, 279 U. S. 438, 454; *United States v. Jones*, 119 U. S. 477. We do not consider just what application the principles announced in the *Klein* case could rightly be given to a case in which Congress sought, *pendente lite*, to set aside a judgment of the Court of Claims in favor of the Government and to require relitigation of the suit. For we do not construe the Special Act as requiring the Court of Claims to set aside the judgment in a case already decided or as changing the rules of decision for the determination of a pending case.

Before the Special Act the claims of petitioner on his contract with the Government had been passed upon judicially and merged in a judgment which was final. *United States v. Jones*, *supra*; *In re Sanborn*, 148 U. S. 222, 225; *Luckenbach & S. Co. v. United States*, 272 U. S. 533, 536 *et seq.* This Court denied certiorari, and the judgment, which remains undisturbed by any subsequent legislative or judicial action, conclusively established that petitioner was not entitled to recover on his claims. The Special Act did not purport to set aside the judgment or to require a new trial of the issues as to the validity of the claims which the Court had resolved.

against petitioner. While inartistically drawn the Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.

We perceive no constitutional obstacle to Congress's imposing on the Government a new obligation where there had been none, before, for work performed by petitioner which was beneficial to the Government and for which Congress thought he had not been adequately compensated. The power of Congress to provide for the payment of debts, conferred by § 8 of Article I of the Constitution, is not restricted to payment of those obligations which are legally binding on the Government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary. *Roberts v. United States*, 92 U. S. 41; *United States v. Realty Company*, 163 U. S. 427; *United States v. Carl*, 257 U. S. 523; *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 314. Congress, by the creation of a legal, in recognition of a moral, obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal. Nor do we think it did so by directing that court to pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act and to give judgment accordingly. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 15 How. 421; *Roberts v. United States*, *supra*; see *Cherokee Nation v. United States*, 270 U. S. 476, 486; cf. *Klamath Indians v. United States*, 296 U. S. 244; *United States v. Klamath Indians*, 304 U. S. 119.

Congress having exercised its constitutional authority to impose on the Government a legally binding obligation, the decisive question is whether it invaded the judicial province of the Court of Claims, by directing it to determine the extent of

The Court of Claims has often so held in other cases. See, e.g., *Nash v. United States*, 135 U. S. 71, 82; *Ch. 131*; *Murphy v. United States*, 14 U. S. 159; *Ch. 25*; *Adams*, 104 U. S. 464, 477; *Ch. 191*; *Wink*, 104 U. S. 134; *Ch. 171*; *Ch. 172*; *Ch. 173*; *Ch. 174*; *Ch. 175*; *Ch. 176*; *Ch. 177*; *Ch. 178*; *Ch. 179*; *Ch. 180*; *Ch. 181*; *Ch. 182*; *Ch. 183*; *Ch. 184*; *Ch. 185*; *Ch. 186*; *Ch. 187*; *Ch. 188*; *Ch. 189*; *Ch. 190*; *Ch. 191*; *Ch. 192*; *Ch. 193*; *Ch. 194*; *Ch. 195*; *Ch. 196*; *Ch. 197*; *Ch. 198*; *Ch. 199*; *Ch. 200*; *Ch. 201*; *Ch. 202*; *Ch. 203*; *Ch. 204*; *Ch. 205*; *Ch. 206*; *Ch. 207*; *Ch. 208*; *Ch. 209*; *Ch. 210*; *Ch. 211*; *Ch. 212*; *Ch. 213*; *Ch. 214*; *Ch. 215*; *Ch. 216*; *Ch. 217*; *Ch. 218*; *Ch. 219*; *Ch. 220*; *Ch. 221*; *Ch. 222*; *Ch. 223*; *Ch. 224*; *Ch. 225*; *Ch. 226*; *Ch. 227*; *Ch. 228*; *Ch. 229*; *Ch. 230*; *Ch. 231*; *Ch. 232*; *Ch. 233*; *Ch. 234*; *Ch. 235*; *Ch. 236*; *Ch. 237*; *Ch. 238*; *Ch. 239*; *Ch. 240*; *Ch. 241*; *Ch. 242*; *Ch. 243*; *Ch. 244*; *Ch. 245*; *Ch. 246*; *Ch. 247*; *Ch. 248*; *Ch. 249*; *Ch. 250*; *Ch. 251*; *Ch. 252*; *Ch. 253*; *Ch. 254*; *Ch. 255*; *Ch. 256*; *Ch. 257*; *Ch. 258*; *Ch. 259*; *Ch. 260*; *Ch. 261*; 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the obligation by reference, as directed, to the specified facts, and to give judgment for that amount. In answering, it is important that the Act contemplated that petitioner should bring suit on his claims in the usual manner, that the court was given jurisdiction to decide it, and that petitioner by bringing the suit has invoked, for its decision, whatever judicial power the court possesses. Cf. *United States v. Realty Company, supra*. In this posture of the case it is pertinent to inquire what, if anything, Congress added to or subtracted from the judicial duties of the Court of Claims by directing that it consider the case and give judgment for the amount found to be due. Stripped of all complexities of detail the case is one in which, simply stated, petitioner has sought to enforce the obligation, which the Government has assumed, to pay him for work done and not paid for. Congress has in effect consented to judgment in an amount to be ascertained by reference to the specified data.

When a plaintiff brings suit to enforce a legal obligation it is not any the less a case of controversy upon which a court possessing the federal judicial power may rightly give judgment, because the plaintiff's claim is uncontested or incontestable. Nor is it any the less so because the amount recoverable depends upon a mathematical computation based upon data to be ascertained which by the terms of the obligation are its measure. For in any case the court is called upon to sanction, by its judgment, an alleged obligation in a proceeding in which the existence, validity and extent of the obligation, the existence of the data, and the correctness of the computation may be put in issue.

The court below seems to have assigned that its only function under the Special Act was to make a calculation based upon data to be found in the Act and in the findings of the earlier suit. In view of the provisions of the Special Act for taking evidence and for considering the evidence in the first suit, we cannot say that all the earlier findings are to be deemed settled, and that the court could not have been called upon in this proceeding to determine judicially whether they are so. Whether the Act makes them conclusive, and if not, whether the evidence would establish the facts upon which the Act prescribes liability, are judicial questions. But if the facts be ascertained by proof or by stipulation, it is not a part of the judicial function to determine whether there is a legally binding obligation and, if so, to give

judgment for the amount due, though the amount depends upon mere computation.

It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is a judicial act. *United States v. Swift*, 286 U. S. 106, 115; *Swift v. United States*, 276 U. S. 343, 324; see also *Pacific R.R. v. Kitchum*, 101 U. S. 289; *United States v. Babbitt*, 104 U. S. 767; *Nashville, Chattanooga & St. Louis Ry. v. United States*, 113 U. S. 261; *Thompson v. Merchants Land Grant Co.*, 168 U. S. 451. It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts; *J. I. Case Co. v. Labor Board*, 321 U. S. 332, 333; *Johnson v. Yellow Cab Co.*, 321 U. S. 382, 388; *Equitable Society v. Comm'r*, 321 U. S. 560, 561; or when the defendant is in default. *Voorhees v. Bank of the United States*, 10 Pet. 449; *Randolph v. Barrett*, 16 Pet. 138; *Clements v. Berry*, 11 How. 398; *Cooper v. Reynolds*, 10 Wall. 308; *Rio Grande Irrigation Co. v. Gildersleeve*, 174 U. S. 603; *Fidelity and Deposit Co. v. United States*, 187 U. S. 315; *Christianson v. King County*, 239 U. S. 356, 372. It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly. *Renner and Bussard v. Marshall*, 1 Wheat. 215; *Aurora City v. West*, 7 Wall. 82, 101; *Clements v. Berry* *supra*; cf. *Manhew v. Thatcher*, 6 Wheat. 129. In all these cases the court determines that the unchallenged facts shown of record establish a legally binding obligation, and indicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment.

We conclude that the effect of the Special Act was to authorize petitioner to invoke the judicial power of the Court of Claims, and that he has done so. It is true that Congress has imposed on that court, as it has on the courts of the District of Columbia, non-judicial duties of an administrative or legislative character. See *In re Saurorn*, *supra*; *Race v. Graham v. Nelson*, 289 U. S. 266, 275. Those imposed on the Court of Claims are such as it has traditionally exercised over since its original organization as a mere agency of Congress, to aid in the performance of its constitutional duty to provide for payment of the debts of the Govern-

ment. Such administrative duties coexist with its judicial functions. See *Ex Parte Baker* Corp'n, *supra*, 452, *et seq.* Its decisions rendered in its administrative capacity are not judicial acts, and their review, even though sanctioned by Congress, is not within the appellate jurisdiction of this Court. *Gordon v. United States*, 2 Wall. 561; and see the views expressed by Taney, C. J., in 117 U. S. 697; *In re Southern*, *supra*. But notwithstanding the retention of such administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. III, Sec. 2, Cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims; *De Groot v. United States*, 5 Wall. 419; *United States v. Jones*, *supra*; *Nashville C. & St. F. R. v. Wallace*, 288 U. S. 249, 263; and of the courts of the District of Columbia; *Radio Comm'n v. Nelson Bros. Co.*, *supra*, and cases cited.

We have no occasion to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges. *U. S. v. Williams*, *United States*, 289 U. S. 553. It is enough that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has authorized it as an interior court to perform judicial functions whose exercise is reviewable here. The problem presented here is not different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases. Its possession of non-judicial functions by direction of Congress presents no more obstacle to appellate review of its judicial determinations by this Court than does the performance of administrative functions by the courts of the District of Columbia or by state courts. So exercise of judicial power, in the cases specified in Art. III, Sec. 2, Cl. 1 of the Constitution, is reviewable here by this Court. See 2 Comp. S. W. *Bell Tel. Co. v. Oklahoma*, 209 U. S. 209, with *Bell Tel. Co. v. Kansas*, 302 U. S. 655. See also *U. S. v. Atlantic Coast*, 401 U. S. 211, 210, 225, 226, *aff'd*, 401 U. S. 244, 245, 246, 247.

The Court of Claims' determination that the Special Act conferred non-judicial functions and hence that it had

no judicial duty to perform was itself an exercise of judicial power reviewable here. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. The case is not one where the court below has made merely an administrative decision not subject to judicial review, without purporting to act judicially or to rule as to the extent of its judicial authority as the ground of its action or refusal to act. *Postum Cereal Co. v. Cal. Fig & Nut Co.*, 272 U. S. 693. Jurisdiction to decide is jurisdiction to make a wrong as well as a right decision. *Faulstich v. Lum*, 210 U. S. 230, 234, 235; *Brown v. Board of Education*, 347 U. S. 481, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

SEVERAL OTHER CASES

Reversed.

Mr. Justice Jackson took no part in the consideration or decision of this case.